

## Adjudication of Grievances in Public Service of Canada La Loi concernant le service civil au Canada

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Résumé de l'article

Avant 1967, les employés de la fonction publique fédérale n'avaient aucun moyen véritable d'obtenir le redressement de leurs griefs. La Loi concernant le service civil du Canada de 1961 prévoyait, cependant, un mécanisme d'appel dans les cas de promotion et de mutation, de refus d'augmentation de salaires, aussi bien que dans ceux de suspension, de rétrogradation et de renvoi. La Loi obligeait le comité d'appel à tenir une enquête sur le litige et à faire des recommandations à la Commission sur la façon de disposer des appels. La décision finale revenait à la Commission de la Fonction publique. Comme le comité d'appel n'était pas habilité à prendre des décisions, au mieux sa fonction demeurait consultative.

Depuis l'adoption de la Loi sur l'emploi dans la Fonction publique et de la Loi sur les relations de travail dans la Fonction publique, en 1967, la situation a beaucoup changé. Les griefs qui donnaient lieu antérieurement à une révision du comité d'appel ont été répartis entre le mécanisme permanent de règlement des réclamations et l'arbitrage prévus à la Loi sur les relations de travail dans la Fonction publique, d'une part et le comité d'appel prévu à la Loi sur l'emploi dans la Fonction publique, d'autre part.

Des désaccords comme les nominations par « concours restreints », les promotions sans concours, les rétrogradations et les renvois pour incompétence ou incapacité relèvent encore de la Commission de la Fonction publique. La législation a prévu remède aux plaintes relatives aux suspensions, au refus d'augmentations de salaires, à la rétrogradation ou au renvoi pour inconduite au moyen du mécanisme permanent de règlement des réclamations et de l'arbitrage en vertu de la Loi sur les relations de travail dans la Fonction publique. La compétence du comité d'appel se limite maintenant à permettre à un fonctionnaire pris individuellement d'obtenir la révision des décisions des ministères qui ne sont pas du ressort du comité des réclamations et de l'arbitrage prévus à la Loi sur les relations de travail dans la Fonction publique. Il y a, toutefois, certains cas où le plaignant n'a droit ni à l'appel ni au mécanisme de règlement des griefs.

La Loi sur les relations de travail dans la Fonction publique a assuré à tout employé de la fonction publique fédérale le droit d'accéder à un mécanisme de règlement des réclamations pour trancher toute plainte contre son employeur. La LRTFE est unique en ce qu'elle permet même aux personnes qui occupent des postes de direction et de nature confidentielle de présenter des griefs. En règle générale, celles-ci font partie des cadres et ne sont pas comprises dans l'unité de négociation, qu'il s'agisse du secteur public ou du secteur privé.

La Loi sur les relations de travail dans la Fonction publique comporte un mécanisme permanent visant au règlement des griefs par un tribunal indépendant. La législation du travail dans les autres champs d'activité exige qu'une convention collective contienne une clause relative à l'arbitrage exécutoire comme dernière étape du processus de règlement des griefs. La Loi a stipulé qu'il pourrait y avoir arbitrage des réclamations peu importe qu'une convention collective s'applique ou non au plaignant. Par le mécanisme permanent d'arbitrage, la Chambre des Communes a tenté de substituer la « Rule of Law » (règle de droit) à la discrétion administrative totale dans le domaine des relations du travail dans la fonction publique. La Chambre des Communes n'a pas voulu, cependant, que l'arbitre nommé en vertu de la Loi ait l'autorité de s'immiscer dans les prérogatives de la direction en matière de gestion et de discipline non plus que d'y passer outre. Il a voulu que l'autorité de l'arbitre de réviser la décision de la direction en ces matières se limite aux cas où la direction allait jusqu'à la sanction.

L'arbitrage ne semble pas toutefois suppléer à toutes les décisions unilatérales. Contrairement à la pratique générale, l'arbitrage, en vertu de la Loi, s'ajoute aux appels des ministères, pour ce qui est des griefs pour lesquels on ne dispose d'aucun remède satisfaisant.

Trois catégories de griefs peuvent être référés à l'arbitrage par les plaignants eux-mêmes ou leur agents de négociation (les syndicats). La première catégorie comprend tout grief d'un employé qui a trait à l'interprétation ou à l'application d'une clause de convention collective ou à une décision arbitrale. La deuxième catégorie comprend les griefs où il y a eu sanction disciplinaire contre le plaignant qu'il s'agisse de renvoi, de suspension ou d'amendes. La troisième catégorie inclut les cas où l'on recherche l'exécution d'une obligation découlant d'une convention collective ou d'une sentence arbitrale. L'agent de négociation ou l'employeur peuvent soumettre ces griefs. On appelle familièrement cette catégorie de griefs des « griefs politiques ».

La décision de l'arbitre est finale. La Commission des relations de travail dans la Fonction publique a été autorisée à réviser la décision d'un arbitre en matière de question de droit ou de compétence. Le système d'arbitrage fonctionne sous la surveillance générale de la Commission des relations de travail dans la fonction publique sous l'autorité de l'arbitre en chef. Au cours des cinq dernières années, les arbitres ont disposé d'un bon nombre de plaintes et ont ainsi donné une orientation nouvelle aux relations du travail dans la fonction publique fédérale.

# Adjudication of Grievances in Public Service of Canada

Arjun P. Aggarwal

*Employer-employee relations in the Federal Public Service of Canada entered a new era with the proclamation on March 13, 1967, of three Acts — The Public Service Staff Relations Act ; The Public Service Employment Act ; and an Act to Amend the Financial Administration Act. The employees have been guaranteed the right to organize, the right to bargain, the right to strike and the right to get grievances adjudicated by an independent tribunal. The statutory right to grieve and get the grievances adjudicated have provided to the federal public employees a sense of justice and « fairplay ». The adjudication system has made the private sector of industrial jurisprudence applicable to the federal public services with a remarkable success. This article deals with the function and operation of the statutory Grievance Process and Adjudication.*

## INTRODUCTION

The decade of 1960 may be termed as a « golden age » of public employees, particularly, in the North American Continent. The historic decisions, both in the United States and Canada, to guarantee to the

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public employees equity, justice and fairplay, and to bring them to par with their counterparts in the private sector, were taken in this decade. In 1962, President Kennedy issued Executive Order 10988 and, in 1967 Canadian Parliament enacted the *Public Service Staff Relations Act*, both aiming to establish collective bargaining processes at the Federal level of the Governments. Apart from the basic theme of collective bargaining, these declarations established the process of handling grievances with a provision for final decision<sup>1</sup> by the third party.

Employer-employee relations in the Federal Public Service of Canada entered a new era with the proclamation on March 13th, 1967 of the three Acts. These Acts are :

- (1) *The Public Service Staff Relations Act (PSSRA)*
- (2) *The Public Service Employment Act (PSEA)*
- (3) *An Act to amend the Financial Administration Act.*

Taken together, these acts and regulations provided for sweeping reforms in the internal administration of the Public Service of Canada.

The *Public Service Staff Relations Act* is concerned exclusively with the regulation of collective bargaining and the processing of grievances. In essence, it is a conventional labour relations Act modified in some areas to conform with the special requirements of the Public Service.

The Canadian Parliament did not hang on to the outmoded rigid concept of sovereignty and gave way to a progressive legislation in the public sector by guaranteeing public employees the right to organize, the right to bargain, (including wages), the right to strike and the right to get grievances adjudicated by independent tribunal. By enacting the *Public Service Staff Relations Act*, Canada has earned the leadership by providing the most progressive labour legislation for public employees<sup>2</sup> so far enacted in this continent.

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<sup>1</sup> In the United States, Executive Order 10988 had provided only Advisory Arbitration. In 1969, Executive Order 11491 made provision for binding arbitration.

<sup>2</sup> In this respect Canada surpassed even the United States efforts originated five years earlier with President Kennedy in 1961 and improved and modified by President Nixon through Executive Order 11491.

In the words of Professor Herman :

« As we consider Canada's avant-garde approach to collective bargaining in the public sector, it is interesting to recall that in the past, Canada was nine years behind the United States in enactment of a law resembling the Wagner Act of 1935. Now Canada is a North American revolutionary in the area of industrial relations legislation in the Federal Public Service. »<sup>3</sup>

This paper is concerned only with one aspect of the Act, that is, « Adjudication of grievances ». <sup>4</sup> There are various fascinating facets of the adjudication process which one would like to study but, because of time and space, I have confined myself, in this article, with the administration of grievances and the adjudication system. It will not give the reader the complete picture that he may expect, but it should provoke him to something further. This paper is divided into three small segments — Appeals, Grievances and Adjudication with special emphasis on Adjudication.

## APPEALS

The Appeal System in the Federal Public Service was provided for the first time in 1961, through the *Civil Service Act*<sup>5</sup>. In the old *Civil Service Act* which was in force up to March 31, 1962, there was no express provision for appeals of any kind, but the former Civil Service

<sup>3</sup> Herman EDWARD. *An Evaluation of the Canadian Public Service Staff Relations Act*, 103 in *Public Employees Organization and Bargaining* (B. N. A., Washington, 1968).

<sup>4</sup> The term « adjudication » in this statute has been used for grievance arbitration. The expression arbitration, in labour disputes, in North American Continents, is generally understood, to be an arbitration of disputes over « Rights » and not over « interest ». As the expression Arbitration, in this statute, has been used for « disputes over interest », a new expression was needed to distinguish it from « disputes over rights ». Thus, the term adjudication has been used for the arbitration of grievance cases.

<sup>5</sup> Under the provisions of the *Civil Service Act*, 1918, the civil servants had the right to appeal directly to the Civil Service Commission, against decisions affecting their interest relating to promotion, demotion, suspension and dismissal. But those appeals were unstructured and the relief was in the form of Administrative review. The Glassco Commission has observed :

« In most such cases « appeal » is a misleading designation. The deputy head is usually acting only as the agent of the Commission and what is involved is essentially an administrative review. » *Royal Commission on Government Organization* Vol. 1, Page 389 (1962)

Regulations did outline the procedure for appeal against the result of promotion competitions. There was also a procedure in the old Regulations for the establishment of a « Review Board » to deal with appeals against the denial of salary increases. For the most part, these Review Boards were composed of departmental officials whose reports and recommendations were reviewed by the Commission and decisions were then made by the Commission on the disposition of the appeals.

The 1961 *Civil Service Act*, which went into effect on April 1, 1962, had made express provision for a statutory right to appeal to the Commission, not only against proposed promotions, with or without competition, and against denial of salary increases, but also against proposed transfers, with or without competition, and against suspensions, demotions and dismissals <sup>6</sup>.

The appeals system was administered by the Civil Service Commission under the provisions of the *Civil Service Act* of 1961 <sup>7</sup>. Under the *Civil Service Act*, every Appeal Board had to be composed of three persons, who were required to conduct an inquiry into the subject matter of the appeal and to make a recommendation to the Commission for the disposition of the appeal <sup>8</sup>. A final decision was to be made by the Civil Service Commission <sup>9</sup>. As the Appeal Board had no power to make decisions, its function, at best, remained advisory. The Appeal Board, however, was required to « act judically and not ministerially or administratively », to give compliance to the procedures set out by the Statute, and to act in good faith <sup>10</sup>.

Since the passage of the *Public Service Employment Act* and *Public Service Staff Relations Act* in 1967, the situation has considerably changed. The subject matters of complaint which were appealable to the Appeal Board under the former *Civil Service Act*, have now been distributed between the grievance process and adjudication under the *Public Service*

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<sup>6</sup> *The Civil Service Act*, 1960-61, C.57 Sections 60 and 70.

<sup>7</sup> *Ibid.*, Section 70.

<sup>8</sup> *Ibid.*

<sup>9</sup>*Ibid.*

<sup>10</sup> *Regina v. A. Civil Service Commission Appeal Board, Ex Parte Benoit, Regina v. Deputy Post Master-General, Ex Parte Benoit*, (1966) 1 O. R. 39.

*Staff Relations Act* on the one hand, and the Appeal Board under the *Public Service Employment Act* on the other <sup>11</sup>.

Now, the *Public Service Employment Act* entitles an employee to appeal to the Public Service Commission against :

- Appointment by « closed competition » involving a promotion or transfer ; that is, a competition open only to persons employed in the Public Service <sup>12</sup>,
- Promotion without competition <sup>13</sup>,
- Demotion for incompetence or incapacity <sup>14</sup>, and
- Release (discharge) for incompetence or incapability <sup>15</sup>.

There is, however, no right of appeal against the result of an « open competition » ; that is, a competition open to persons employed in the Public Service, as well as to persons who are not so employed. Further, there is no right of appeal :

- (1) When an employee is rejected during his probationary period under Section 28 of the Act.
- (2) When an employee is laid off under Section 29 of the Act either because of lack of work or because of the discontinuation of a function.
- (3) When an employee resigns in anticipation of release.

The issue of suspension, denial of salary increase, demotion for misconduct or dismissal for misconduct are no more appealable to the Public

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<sup>11</sup> This distribution is based on the recommendations of the Heeney Commission : In the opinion of the Preparatory Committee, some of matters now subject to a direct appeal to the Civil Service Commission, notably matters relating to disciplinary action (including financial penalty, suspension and discharge for disciplinary reasons), should be made subject to the proposed grievance procedure. We hold, however, to the view that, because of the « merit principle is directly involved, appeals against promotions and against release for reasons of incompetence or incapacity should continue to be governed by the provisions of the *Civil Service Act*. »

<sup>12</sup> The *Public Service Employment Act*, 1966-67. C. 71 Section 21.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, Section 31.

<sup>15</sup> *Ibid.*

Service Commission ; these are now outside the scope of the *Public Service Employment Act*. The Legislature has provided relief against these issues through the grievance process and adjudication under the *Public Service Staff Relations Act*<sup>16</sup>. The scope of the appeal system is now limited to provide redress to individual public employees against those decisions of the departments for which right to grievance and adjudication is not provided under the *Public Service Staff Relations Act* ; that is, the matters which fall within the ambit of the merit system. Thus, the jurisdiction of the Appeal Board under the *Public Service Employment Act* has been substantially reduced.

The purpose and the significance of the *Public Service Employment Act* has been clearly stated by Justice Lief of the Supreme Court of Ontario in a recent case of *Millard vs. Des Rosiers and the Public Service Commission*<sup>17</sup>. It reads :

« It seems to me that the Parliament of Canada enacted this legislation to safeguard the rights and to ensure the best interests of all employees of the Public Service, to create among its members a confidence that employment matters such as competitions and promotions would be dealt with fairly, impartially and with the utmost of equality. »

The status and powers of the Appeal Board have been raised under the *Public Service Employment Act*<sup>18</sup>. Under Section 21 of the new Act, the Appeal Board is required to make a decision rather than a recommendation<sup>19</sup>. The Public Service Commission must accept and act upon the

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<sup>16</sup> The *Public Service Staff Relations Act*, 1967 (hereinafter cited as PSSRA) Section 90 to 100.

<sup>17</sup> *Regina vs Des Rosiers Exporte Millard*, (1970) 3 O. R. 446 ; *Re : O'Bryne and Bazley et al.*, (1971) 3 O. R. 309. Justice Pennell, in the latter case, has stated the purpose of the *Public Service Employment Act* in these words :

« I understand the object of Parliament is this : to make sure that appointments are made by competition ; that an area of competition is designed ; that notice of the competition is posted ; that applications are received and considered ; that an eligible list is established in order of merit ; and that appointments are made from that list.

The Court further observed :

It is manifest, of course, that Parliament enacted this legislation to safeguard the rights of employees of the Public Service and to create among its employees a confidence that employment matters such as competitions would be dealt with fairly and impartially. »

decisions of the Appeal Board<sup>20</sup>. In other words the decision of the Appeal Board is final ; it is not merely a recommendation as it used to be under the old statute.

Though the Appeal Board is still appointed by the Commission, it becomes independent on its appointment and has the trappings of an impartial judicial tribunal. The Appeal Board has a duty under the Act « to conduct an inquiry » into the applicant's complaint<sup>21</sup>.

Commenting on the jurisdiction and functions of the Appeal Board under the *Public Service Employment Act*, the Supreme Court of Ontario has observed :

« It is not open to the Appeal Board to decide what is the best possible procedure for the Departments. . . This is the function of the Parliament and the *Appeal Board cannot decide what would be the best procedure for a particular department, but rather must determine only if the statutory requirements were observed*. It goes without saying that the Appeal Board must not act contrary to the intention of Parliament as it spoke the statute in question. »<sup>22</sup> (Emphasis added)

The court concluded :

« I conclude, therefore, that the Appeal Board must act judicially and that certiorari proceedings may be brought to review a decision of that body. »<sup>23</sup>

In a recent case, Justice Pennell of the Supreme Court of Ontario, discussed the nature of proceedings before the Appeal Board and commented :

« The procedure, nevertheless, must be in *accordance with the rules of natural justice* and the appellant must be afforded every opportunity to present his « cause » by way of examining and cross-examining witnesses and addressing arguments to the Appeal Board on the whole of the case. There is no need to add that the *Appeal Board must act in good faith and fairly* listen to both side. »<sup>24</sup> (Emphasis added)

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<sup>18</sup> The *Public Service Employment Act*, 1966-67 Sections 21 and 31 (3).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, See also *Millard Case Supra* note 17.

<sup>21</sup> The *Public Service Employment Act*, 1966-67 Section 21 (b) and Section 31 (3).

<sup>22</sup> *Millard case Supra* note 17. (emphasis added).

<sup>23</sup> *Ibid.*

<sup>24</sup> *O'Bryne case Supra* note 17 at 318.

The regulations made pursuant to the *Public Service Employment Act* provide that when an appeal is received, the Commission shall establish an inquiry into the matter<sup>25</sup>. In practice, appeals are generally heard by a one-man Appeal Board, except in special circumstances where the Commission deems it desirable to have the Appeal Board composed of more than one person.

An appeal under Sections 21 and 31 of the Act shall be in writing addressed to the Commission and shall state the grounds on which the appeal is based<sup>26</sup>. An employee must file his appeal within 14 days from the day on which the statement regarding the right to appeal is sent to him, or within 14 days from the day on which the matter he wishes to appeal came to his attention<sup>27</sup>.

<sup>25</sup> Public Service Employment Regulations, 1967, Section 45. It reads : —

« Upon receipts by the Commission of an appeal document referred to in Section 44, the Commission shall

- (a) establish a board, consisting of one or more persons, to conduct an inquiry into the matter and give to the board the appeal document, and
- (b) send a copy of the appeal document to the deputy head concerned.

<sup>26</sup> Public Service Employment Regulations — 1967, Section 44, It reads : —

- (1) Every appeal brought under Sections 21 or 31 of the Act shall be in writing addressed to the Commission and shall state the grounds on which the appeal is based, such writing being herinafter to as the « appeal document ».
- (2) Every appeal document shall state whether the appeal is to be presented in the English language or in the French language.

<sup>27</sup> Public Service Employment Regulations 1967, Sections 42 and 43. Section 42 reads as follows : —

Every appeal under Section 21 of the Act shall be brought,

- (a) in the case provided in Section 40 of these Regulations, within fourteen days from the day on which the statement mentioned in that Section is sent to the person proposing to appeal, and
- (b) in the case provided for in Section 41 of these Regulations, within fourteen days from the day on which the matters mentioned in Sub-Section (2) of that section are brought to the attention of the person proposing to appeal.

Section 43 reads : —

- (1) Every notice in writing given to an employee, pursuant to subsection 2 of Section 31 of the Act, shall contain a statement showing that the employee may appeal, under Section 31 of the Act, against the recommendations of the deputy head and the time, as prescribed by subsection (2) of this section, within which the appeal must be brought.
- (2) Every appeal under Section 31 of the Act shall be brought within fourteen days from the day on which the notice mentioned in subsection (1) of this section is sent to the employee.

A copy of the appeal document is sent to the department concerned<sup>28</sup>. The department, however, is not required to offer rebuttal prior to the appeal hearing. The employee has a right to be represented before the Board by himself, through his Staff Association, or by any person of his choice, including a lawyer.

It was expected that with the limited jurisdiction of the Appeal Board under the *Public Service Employment Act*, there would be a substantial decline in appeal cases. However, in spite of the reduction of the matters which are appealable, there has been a gradual increase of about 40% in the total number of appeals heard by the Board during the past four years.

The following tables give the breakdown of the appeals, showing the outcome on the basis of the subject matter of appeals. It is evident, that with the increase in total appeals, the number of appeals upheld by the Boards has significantly improved. In 1966 only 99 (12.3%) appeals were allowed, whereas in 1970, 452 (33%) appeals were allowed out of 1370 appeals filed under Section 21 of the Act.

#### ACCESS TO FORMAL GRIEVANCE PROCESS — A STATUTORY RIGHT

The word « grievance » was mentioned for the first time in the *Civil Service Act* of 1961. The Civil Service Commission was authorized to make regulations prescribing the procedure for dealing grievances<sup>29</sup>. Such procedures as then existed, tended to be relatively informal and dealt in rather imprecise terms with the rights of employers and employee organizations<sup>30</sup>. There was no provision for adjudication for unresolved

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<sup>28</sup> Public Service Employment Regulations, 1967.  
Section 45 (1) (b).

<sup>29</sup> The *Civil Service Act*, 1961 C. 57, Can. Stat. 381 Section 68 (s) : It Reads : « prescribing procedure on appeals, and prescribing the procedure for dealing with grievances, as defined in such regulations, arising out of the administration of this Act and of the regulations. »

<sup>30</sup> Report of the Preparatory Committee on Collective Bargaining in the Public Service (Canada) (1965). The Preparatory Committee was established by the Government in August 1963, under the Chairmanship of A. D. P. Heeney, to make preparations for the introduction, into Public Service of Canada, of an appropriate form of collective bargaining and arbitration. The Committee's report was submitted to the Government in July 1965 and Legislation (Bill C-170) was introduced in Parliament in the Spring of 1966.

**TABLE I**  
 SHOWING THE APPEALS FILED WITH THE APPEAL BOARD UNDER THE CIVIL SERVICE ACT, 1961  
 DURING 1962 to 1966

	<i>Appeals Against Promotion</i>				<i>Appeals against Disciplinary Action</i> (Denial of salary increase, suspension, demotion, and recommended dismissal)			
	<i>Appeals Filed</i>	<i>Allowed</i>	<i>Dismissed</i>	<i>Withdrawn</i>	<i>Appeals Filed</i>	<i>Allowed</i>	<i>Dismissed</i>	<i>Withdrawn</i>
1962	632	153 (24.2%)	376	102	102	23	96	22
1963	793	158 (20%)	487	148	248	43	162	43
1964	835	146 (17.5%)	555	134	201	17	139	45
1965	810	94 (11.6%)	535	181	184	13	138	32
1966	804	99 (12.3%)	496	209	191	29	132	30

*Source* : The information is compiled from the **Annual Reports** of the Appeal Division of the Civil Service Commission for the years 1963 to 1967.

TABLE II

SHOWING THE BREAKDOWN OF APPEALS AGAINST THE DISCIPLINARY ACTION TO THE APPEAL BOARD DURING 1962 - 67

	<i>Against Denial of Salary Increase</i>				<i>Against Suspension</i>				<i>Against Demotion</i>				<i>Against Recommended Dismissal</i>			
	<i>Filed</i>	<i>Allowed</i>	<i>Dismissed</i>	<i>Withdrawn</i>	<i>Filed</i>	<i>Allowed</i>	<i>Dismissed</i>	<i>Withdrawn</i>	<i>Filed</i>	<i>Allowed</i>	<i>Dismissed</i>	<i>Withdrawn</i>	<i>Filed</i>	<i>Allowed</i>	<i>Dismissed</i>	<i>Withdrawn</i>
1962	59	9	41	9	16	2	11	3	10	5	4	1	56	7	40	9
1963	50	14	24	12	29	9	17	3	17	3	11	3	152	17	110	25
1964	33	3	23	7	28	2	20	6	44	5	33	6	96	7	63	26
1965	25	0	23	2	25	3	15	7	46	3	36	7	88	7	65	16
1966	34	7	20	7	66	10	46	10	32	9	18	5	59	3	48	8

*Source:* The information is compiled from the Annual Reports of the Appeal Division of the Civil Service Commission for the years 1963 to 1967.

TABLE III

SHOWING THE APPEALS FILED WITH THE APPEAL BOARD UNDER SECTIONS 21 & 31 OF THE PUBLIC  
SERVICE EMPLOYMENT ACT DURING 1967 to 1970 :

Year	<i>Appeals under Section 21</i>			<i>Appeals under Section 31</i>				<i>Appeals both under Sections 21 &amp; 31</i>		
	<i>Against Promotion by closed Competition</i>	<i>Against Promotion Without Competition</i>	<i>Total Appeals</i>	<i>Appeals Allowed</i>	<i>Release for Incompetence or Incapacity or Demotion for Incompetence or Incapacity</i>	<i>Total Appeals</i>	<i>Appeals Allowed</i>	<i>Total Appeals</i>	<i>Increase from Previous Years.</i>	
1966	N/A	N/A	N/A	99 (12.3%)	N/A	N/A	N/A	N/A	995	N/A
1967	834	317	1,151	216 (18.7%)	22	—	22	3 (13%)	1,263	208 (26.9%)
1968	939	340	1,279	292 (22%)	37	2	39	9 (24%)	1,318	15 (4%)
1969	932	436	1,368	435 (31%)	39	6	45	19 (46%)	1,413	95 (7%)
1970	1,062	308	1,370	452 (33%)	40	7	47	15 (32.5%)	1,417	4 (.03%)

Source : Public Service Commission, Appeal Branch's Annual Reports for the Years 1967 to 1970.

N/A = not available.

grievances. The departments and even units of departments have tended to deal with grievances according to their own particular philosophies and circumstances<sup>31</sup>. Thus, as a general rule, the public servants did not have access to a grievance procedure of the type available to employees covered by collective agreements in the private sector<sup>32</sup>.

The preparatory committee had come to the conclusion that this deficiency should be remedied, and had recommended

that, in the interests of equity and uniformity, the legislation governing the Public Service system of collective bargaining and arbitration should require all the departments and agencies within its field of application to introduce a grievance procedure with certain basic characteristics and to make it available to all persons in their employ. It concluded also, that certified bargaining agents should be given a well-defined role in the processing of grievances arising out of the interpretation of collective agreements and arbitral awards. It concluded with respect to grievances of this type, that provision should be made for independent adjudication.<sup>33</sup>

On the basis of the recommendations of the Preparatory Committee, the *Public Service Staff Relations Act* has guaranteed to every employee in the federal public service, the right to have an access to a formal grievance process for his grievances against his employer<sup>34</sup>. This right is in addition to the commonly-enjoyed right by the employees in the private sector jurisdiction to present grievances with respect to the interpretation or application of a collective agreement and which, of course, arises only after a collective agreement has been entered into. Further, the right to resort to the statutory grievance process has also been extended to persons who are not entitled to collective bargaining under the Act. The legislation is unique in this respect that the right to process grievances has been extended to employees whether or not they are included in the bargaining unit for which a bargaining agent has been certified. The statutory right to the grievance process established by the Act is also available to persons

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<sup>31</sup> Royal Commission on Government Organization, Vol. 1, P. 388 (1962) — (Popularly known Glassco Commission).

<sup>32</sup> Report of the Preparatory Committee on Collective Bargaining in the Public Service (Canada) (1965).

<sup>33</sup> *Ibid.*, at 38.

<sup>34</sup> PSSRA, Sec. 90.

excluded from the class of « employees » as defined in the Act because they have been « designated » by the Board as persons employed in a managerial and confidential capacity<sup>35</sup>. The grievance process, however, is not available to those public service employees who are excluded from the definition of the term « employees »<sup>36</sup> for reasons other than that they are excluded in managerial or confidential capacity.

It is significant to note that the *Public Service Staff Relations Act* has a unique provision by which it allows even the persons employed in managerial and confidential capacity to file grievances under the statutory set up. Normally, they are treated as a part of the management team and

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<sup>35</sup> PSSRA, Sec. 2 (p). Persons employed in a « Managerial or Confidential » capacity has been defined by Section 2 (U) of the Act. Such persons are excluded from belonging to bargaining units. Some of the people so defined in the Act are persons in confidential positions in Minister's and Deputy Minister's offices; legal officers of the Department of Justice; persons who have executives and responsibilities in relation to the development and Administration of government programs; persons whose duties include those of Personnel Administration or whose duties cause him to be directly involved in the process of collective bargaining on behalf of the employer; person who are required to deal formally on behalf of the employer with a grievance; persons who are employed in positions confidential to any of the aforementioned; other persons who, in the opinion of the Public Service Staff Relations Board should not be included in the bargaining unit by reason of his duties and responsibilities to the employer.

<sup>36</sup> PSSRA, Sec. 2 (m). Term « Employee » means a person employed in the Public Service, other than

- (i) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act,
- (ii) a person locally engaged outside Canada,
- (iii) a person whose compensation for the performance of the regular duties of his position or office consists of fees of office, or is related to the revenue of the office in which he is employed.
- (iv) a person not ordinarily required to work more than one-third of the normal period for persons doing similar work,
- (v) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employer by that Force under terms and conditions substantially the same as those of a member thereof,
- (vi) a person employed on a casual or temporary basis, unless he has been so employed for a period of six months or more,
- (vii) a person employed by or under the Board or
- (viii) a person employed in managerial or confidential capacity, and for the purposes of this paragraph a person does not cease to be employed in the Public Service by reason only of his ceasing to work as a result of a strike or by reason only of his discharge contrary to this or any other Act of Parliament.

are not included in the bargaining unit, either in the private or public sectors in other jurisdictions. There is no other available evidence to show that the persons employed in managerial or confidential capacity enjoy the right to process grievances, either in private or public sector jurisdiction. In this respect, the *Public Service Staff Relations Act* has surpassed all the progressive labour relations legislation so far enacted in the North American Continent.

Generally, a grievance may arise as a result of an act of occurrence giving rise to a feeling of injustice. The feeling of injustice, whether real or imaginary, may develop from a variety of incidents in a day-to-day working relationship. Sometimes, it may arise simply from the fact that an employee is emotionally upset.

If an employee feels that he has been unjustly or unfairly treated in any way by a representative of the management, he has a grievance. Similarly, if an employee feels that either a collective agreement, legislation or regulation has been violated or interpreted or applied to his disadvantage, he has a grievance. Thus, a grievance is any complaint by an employee against any of the terms and conditions of his employment which are within the authority of the employer to correct.

The term « grievance » has been defined in the *Public Service Staff Relations Act* as follows :

« Grievance means a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of himself and one or more other employees, except that

(i) for the purposes of any of the provisions of this Act respecting grievances, a reference to an « employee » includes a person who would be an employee but for the fact that he is a person employed in a managerial or confidential capacity, and

(ii) for the purposes of any of the provisions of this Act respecting grievances with respect to disciplinary action resulting in discharge or suspension, a reference to an « employee » includes a former employee or a person who would be a former employee but for the fact that at the time of his discharge or suspension he was a person employed in a managerial or confidential capacity ;<sup>37</sup>

Thus, a « grievance », according to the statutory definition, is a complaint in writing presented in accordance with the provisions of the Act by an

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<sup>37</sup> PSSRA, Sec. 2 (p).

employee on his own behalf or on behalf of himself and one or more other employees. For the purpose of grievances, the expression « employee » has been given a broader connotation than elsewhere in the Act and includes a person employed in a managerial or confidential capacity<sup>38</sup>. The Act makes it clear that a person who has been discharged or suspended has the right of grievance though he has technically ceased to be an employee<sup>39</sup>.

Is the definition of « grievance » under section 2(p) of the Act complete and satisfactory? <sup>40</sup> It says « grievance » means a complaint in writing ; but in respect of what ? « Grievance » could have been defined more precisely in complete terms, as for example we find, under the Ontario Public Service Rules, which reads :

« grievance » means a complaint made in writing setting forth the reasons for the complaint *in respect to dismissal, working conditions, or terms of employment.*<sup>41</sup> .. (Emphasis added)

According to section 2 (p) a « grievance » may be any complaint by an employee against any of the terms and conditions of employment, which is brought to the attention of management through the formal grievance process. But the statute, however, has not allowed access to an employee to the formal grievance process in all situations of alleged injustice and frustration. For example, an employee is prohibited to present a grievance against any occurrence or matter affecting his terms and conditions of employment for which an administrative process for redress is provided in or under an Act of Parliament.<sup>42</sup> To understand clearly the implication of grievances, section 2 (p) should be read along with section 90, which in fact, explains the nature and scope<sup>43</sup> of a « grievance » for the purpose of this Act ; and entitles an employee to present the grievance at each level, up to and including the final level in the grievance process provided for by the Act.

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<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> Section 2 (p) only gives dictionary meaning of the term « grievance ». A grievance should be in writing according to the provisions of the Act — but it is silent with regard to its scope and real meaning which is further unfolded under Section 90. Compare it with the definition of « grievance » under Ontario Public Service Rules.

<sup>41</sup> Ontario Public Service Regulations, Section 25 (e).

<sup>42</sup> PSSRA, Sec. 90.

### Nature and Scope of Grievance

The right to present a grievance is governed by section 90 of the *Public Service Staff Relations Act*. It entitles an employee in the Public service to present his grievance on the following matters : <sup>44</sup>

- (i) by an interpretation or application in respect of him of a provision of a statute, or of a regulation, by-law, direction or other instruments made or issued by the employer dealing with terms or conditions of employment ;
- (ii) interpretation or application in respect of an employee of a provision of a collective agreement or arbitral award ;<sup>45</sup>
- (iii) any occurrence or matter affecting an employee's term or conditions of employment other than the above, where no other administrative procedure is provided by any other statute.

There is an over-riding condition that limits the types of grievances that may be processed under the *Public Service Staff Relations Act*. No grievance may be processed if there is an administrative procedure provided in or under another Act of Parliament. Thus, as discussed earlier under the Heading of Appeals, there is a process established under the *Public Service Employment Act* for dealing with the certain matters, which are in effect grievances of employees arising out of the application of the « Merit System ».

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<sup>43</sup> In the United States, under the Executive Order 11491, the scope of « grievance » is subject to bargaining. One of the typical definitions of « grievance » in one of the Federal Service collective agreement reads as follows :

« A grievance is defined as an employee's feeling of dissatisfaction with some aspect of his employment, a management decision affecting him, or an alleged violation of his rights. For example, dissatisfaction with working conditions or job relationships, promotional disputes, belief that an adjustment or reprimand is unjustified ; or complaints arising from reassignments and transfer for administrative reasons. »

*See Negotiation Empasses — Grievance and Arbitration in Federal Agreements*, Bulletin 1661, U. S. Department of Labour, Bureau of Labour Statistics — Washington, D. C.

<sup>44</sup> PSSRA, Sec. 90.

<sup>45</sup> In the United States, the executive Order 11491 (Sec. 3) differentiates « employee grievances » from « disputes over interpretation and application of the Agreement », but does not define « employee grievances ».

### **Who Can Present a Grievance — an Employee or Union**

The statute, while defining the term « grievance », has expressly authorized an individual grieved employee to present grievance himself : « grievance » means a complaint in writing presented in accordance with this Act *by an employee* on his own behalf or on behalf of himself and one or more other employees. But, an individual grievor is not as free to present his grievance under the grievance process, as he is to file an appeal.

Subsection 2 of section 90 of the Act has expressly denied him the right of grievance conferred earlier.

An employee, however, is not entitled to present any grievance relating to the interpretation or application in respect to him of a provision of a collective agreement or an arbitral award, unless it has the approval of and is presented by the bargaining agent for the bargaining Unit to which the collective agreement or arbitral award applies, or any grievance relating to any action taken pursuant to an instruction, direction or regulation given or made as described in section 112, a direction or regulation given or made by, or on behalf of the Government of Canada in the interest of safety or security of Canada, or any state allied or associated with Canada.<sup>46</sup>

Thus, with regard to certain grievances involving interpretation and application of collective agreement or arbitral award, an employee must seek the approval of his Bargaining Agent and must be represented by his bargaining agent. He has lost his independence and individuality which has submerged with that of his Union. This seems to be a normal impact of collectivism. Henry Maine's famous saying : « From status to contract, has taken a reverse order. » The above requirement poses certain fundamental questions : If the Union does not approve his grievance ? If the Union discriminates or if the Union happens to have « unholy alliance » with the management, etc ? These issues have been discussed in more detail under the heading of adjudication.

### **Dual System : Grievance Process & Appeal System side by side**

A careful reading of Section 90 of the PSSRA brings into focus the legislative policy regarding handling of grievances. It is evident from it that the Parliament has not provided « Grievance Procedure » as a sub-

<sup>46</sup> PSSRA, Sec. 90 (2).

stitute to departmental procedure for handling complaints, etc. It is in addition to the departmental procedure for those situations where there is no statutory provision existing. Thus, the Act recognizes two classes of grievances. The PSSRA excludes those grievances altogether from its jurisdiction, where statutory redress is available. It means, that two parallel systems for redress of grievances exist side by side in the same administration. This is a unique situation, which is not found either in the private sector or in other jurisdictions of labour relations legislation in Canada. It is not to suggest that one system is better than the other, but this « dual system » is bound to create confusion, uncertainty and legal complications of jurisdiction, as well as a greater degree of dissatisfaction among the employees. This is a normal feeling, that a departmental system of appeals may never be able to win the confidence of the grievor, unless a judicial review is available. Commenting on the departmental appeals Saugee says :

« It is difficult, however, to avoid the conclusion that the whole process is merely unilateral, that the employer in one form or another, at one level or another, makes the final decision. Of course, the employee can proceed from one level of appeal to another, but this is merely going from one segment of public management to another —. This is not an impartial consideration of employee complaint ; it is the application and interpretation of employer rules that are made by the employer. <sup>47</sup> »

But the Appeal System in Canada under the *Public Service Employment Act*, is not a step in hierarchy, it is an independant Quasi Judicial Tribunal, whose decision is subject to judicial review. It seems to have acquired sufficient creditability for its impartiality during the working of the last four years.<sup>48</sup>

The dual system and overlapping of procedure is not unique to Canadian Public Service. It is something inherent in the government

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<sup>47</sup> Freeman F. SAUGEE, « Grievance Arbitration in Public Employment » in *Perspective in Public Employee Negotiations*, Public Personnel Association, Chicago (1969).

<sup>48</sup> Brief of the Professional Institute of Public Service of Canada to Committee on Legislative Review (1971), appeals at 7, « The Institute does not have any allegations to make concerning over-partiality or incompetence on the part of the appeals officers. On the contrary, we have normally been impressed by the integrity and knowledge of these officers. » However, it states further, « Even if appeals officers make every effort to act in a complete impartial way the risk of subconscious bias remains ».

employer — employee relations. The problem of overlapping between grievance procedure and departmental appeals exists in no lesser degree in the United States.<sup>49</sup> In the United States, Civil Service appeals procedure was limited traditionally to appeals from disciplinary action. In 1962, however, under direction of the Executive Order, federal agencies began establishing procedures with a broader scope. Executive Order 10987 required that most federal agencies establish an internal system of appeals from adverse action.

The problem of overlapping procedure in the United States Federal Service occurs in two ways. First, both Civil Service procedures and agency procedures can be used to appeal adverse actions.<sup>50</sup> Second, overlapping could occur where an agency had established its own procedure to cover issues which could also be grieved through the negotiated procedures.<sup>51</sup>

The Executive Order 11491, however, permits the elimination of dual departmental and grievance procedures, thus reducing the problem of overlapping procedures. The elimination of departmental procedures, in units where they have exclusive recognition, is permitted, but not required. The Executive Order 11491 apparently does not eliminate the overlap between agency and civil service procedures for appealing adverse action.

#### **No Man's Land : No Appeal — No Grievance**

Further, three are situations where a grievor has neither a right to appeal nor a grievance. The *Financial Administration Act*, Section 7, authorized the government to suspend an employee and after conducting a hearing at which the person concerned has been heard, to dismiss any person engaged in activities prejudicial to the safety and security of Canada. Under such circumstances, the person concerned has no right to present either an appeal or a grievance.<sup>52</sup>

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<sup>49</sup> See ULLMAN and BEGIN, « The Structure and Scope of Appeals Procedure for Public Employees », *Ind. and Lab. Rel. Rev.*, vol. 23, n° 2, 1970, p. 323.

<sup>50</sup> An adverse action is one which results in an employee's suspension, discharge, furlough without pay, or reduction in rank or compensation.

<sup>51</sup> The purpose of these alternate procedures probably was to provide a means of appeal for employees not in exclusive bargaining units. However, employees in the exclusive bargaining unit also can use them.

<sup>52</sup> The *Financial Administration Act*, Section 7.

In restricting the grievances to be processed through the grievance machinery, whatever might have been the intention of the Parliament, it may undermine the basic purpose — harmonious relations. It must be remembered that far from the actual redress of grievances, it functions as a « safety valve » for steaming out the bitterness generated in day-to-day working relationships. Thus, more than actual, it provides psychological satisfaction. If nothing is done to resolve a certain grievance, the situation could create frustration, which in turn, could lead to lowering of morale and general deterioration of working efficiency. One of the essential purposes of any grievance procedure is to improve communication between employees and those responsible for their well being.

## ADJUDICATION OF GRIEVANCES

### Public Policy and Legislative Scheme

The *Public Service Staff Relations Act* has provided the statutory machinery for adjudication of grievances.<sup>53</sup> It differs from labour legislation in other jurisdictions which only require that a collective agreement should have a provision for binding arbitration as a last step in the grievance process.<sup>54</sup>

Since the enactment of the Act, an employee in the Public Service of Canada has a legal right to present a grievance, whether or not there is in existence a collective agreement applicable to him. This right, however, is subject to the following three qualifications :

1. The term « employee » is defined in Section 2 (m) of the Act, and there are eight classes of persons excluded by that definition, the most numerous being officers of the federal police, i.e., the

<sup>53</sup> PSSRA, Sec. 91 to 99.

<sup>54</sup> See for example, Section 34 of the *Labour Relations Act*, of Ontario (1964), C. 202. It reads :

34. (1) « Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable ;
- (2) If a collective agreement does not contain such a provision as is mentioned in subsection 1, it shall be deemed to contain the following provisions : —..... »

Royal Canadian Mounted Police, persons casually employed for less than six months, and persons employed in managerial or confidential capacities.

2. An employee, as so defined, is not entitled to grieve unless there is no statutory provision for redress, other than those provided by or under the *Public Service Staff Relations Act*.
3. By the general provisions of Section 112 to the *Public Service Staff Relations Act*, nothing in that Act or any other Act shall be construed to require the employer to do, or refrain from doing, anything contrary to any instruction, direction or regulation given by, or made by, on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Although persons employed in a managerial or confidential capacity are excluded from the definition of an employee, nevertheless they have the right to present a grievance, including the right to do so after a suspension or discharge, and such grievances may be referred to adjudication.

The public policy behind the enactment of this provision is to provide to the Federal Public Employee a region of fair dealing which reflects concepts of industrial justice as they have evolved in the private sector during the last fifty years. Through the statutory machinery of adjudication, the Canadian Parliament has attempted to establish the « Rule of Law » in lieu of unfettered administrative discretion in the sphere of employer — employee relations in the Public Service. The purpose of the Act is to « introduce some order, consistency and justice into employer — employee relations by way of collective agreements under which disputes were to be resolved in the grievance process and as a last resort by adjudication. »<sup>55</sup>

The reason for the intervention by an adjudicator is to ward off the danger of arbitrariness and subjective attitudes. Through the right of adjudication, the legislature has instituted for the benefit of civil servants, a control mechanism over the exercise of disciplinary powers.<sup>56</sup> The Parliament, however, did not intend that an adjudicator under the *Public*

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<sup>55</sup> E. B. JOLLIFFE, Q. C. Chief Adjudicator, in *Derbyshire vs. Treasury Board*, Adj. File 167-2-5 (1970).

*Service Staff Relations Act*, should have authority to overrule or interfere with the managements' prerogatives of administration and discipline. The Parliament has intended that an adjudicator's authority to review the decision of management in this area be confined to cases where management was meting out punishment.<sup>57</sup>

The *Public Service Staff Relations Act* has not extended the right of adjudication for all types of grievances of differences between individual employee and his employer, or between the employees' organization and the employer.<sup>58</sup>

The Adjudication does not appear to be a complete substitute for all unilateral actions or departmental procedures established by law. Contrary to general practice in other jurisdictions, adjudication, under the *Public Service Staff Relations Act*, is in addition (supplementary) to departmental appeals, etc., for those grievances for which no satisfactory remedy is otherwise available.

The scheme for the adjudication of grievances is uniform for all portions of the Public Service. The Board's authority to make regulations in respect of adjudication is not subject to the provisions of any collective agreement as is the case with regard to the processing of grievances up to the adjudication stage, except that the parties to an agreement may specifically name an adjudicator of their own choice to handle grievances under the agreement.<sup>59</sup> The Board's authority to make regulations in respect of the adjudication of grievances is set out in section 99 (3) of the Act and reads as follows :

The Board may make regulations in relation to the adjudication of grievances, including regulations respecting :

- (a) the manner in which, and the time within which a grievance may be referred to adjudication after it has been presented, up to and including the final level in the grievance process, and the manner in which and the time within which a grievance referred to adjudication shall be referred by the chief adjudicator to an adjudicator ;

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<sup>56</sup> Adjudicator Fernand MORIN in *L. P. Lariviere vs. Treasury Board*, Adj. File 166-2-8, PSSR Reports M 102 (1967).

<sup>57</sup> See decision of the Board in *Caron* case, Board File 168-2-2, at 5 (1968).

<sup>58</sup> *Segodnia and Kunder etc. vs. Treasury Board*, Adj File 166-2-23 & 24 (1965).

<sup>59</sup> PSSRA, Sec. 2 (a)

- (b) the manner in which, and the time within which boards of adjudication are to be established ;
- (c) the procedure to be followed by adjudicators ;
- (d) the form of decisions rendered by adjudicators.

#### GRIEVANCES REFERABLE FOR ADJUDICATION

There are three classes of cases that may be referred to adjudication by aggrieved employees or their bargaining agents.

The first class of cases includes an employee grievance with respect to the interpretation or application in respect of that employee of a provision of Collective Agreement or an Arbitral Award.<sup>60</sup>

The second class of cases are the employee grievances in which there has been disciplinary action resulting in discharge, suspension or a financial penalty.<sup>61</sup>

The third class of cases is that of grievances to seek enforcement of an obligation arising out of the Collective Bargaining Agreement or Arbitral Award. These grievances may be referred either by the employer or a bargaining agent. These cases are popularly known as Policy Grievances.<sup>62</sup>

#### Prerequisite For Adjudication

A condition precedent to adjudication is that an employee has presented a grievance up to and including the final level of the departmental grievance process without a result satisfactory to the employee,<sup>63</sup> (Exhaustion Requirements). With respect to contract grievances, there is an additional condition that to qualify for adjudication the reference must be approved by the bargaining agent concerned and the bargaining agent must express its willingness to represent the employee in the ensuing proceedings,<sup>64</sup> (Known as Approval Requirements).

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<sup>60</sup> *Ibid.*, Sec. 91 (1) (a)

<sup>61</sup> *Ibid.*, Sec. 91 (1) (b)

<sup>62</sup> *Ibid.*, Sec. 99.

<sup>63</sup> *Ibid.*, Sec. 91 (1)

<sup>64</sup> *Ibid.*, Sec. 91 (2) (a).

### Exhaustion of Grievance Process

As stated earlier, it is a condition precedent for adjudication of an individual grievance that an employee must have exhausted the established departmental grievance process. In the case of *Miss Hodgson vs The Treasury Board*,<sup>65</sup> the learned Chief Adjudicator has observed :

« Suffice it to say that the clear intention of that Section is to require exhaustion of « all » procedure « up to » the final level of the grievance process. With somewhat similar effect, Regulation 44 (2) provides that the failure « to present a grievance to the next highest level » in timely fashion, shall be deemed to constitute an abandonment of the grievance. »

Chief Adjudicator further observed :

« No matter how anxious may be any tribunal to reach the merits of a controversy, to give the party a « day in court », there comes a point at which observance of its procedural rules is so casual that refusal to hear the case is the only way of vindicating the system. The grievance of Miss Hodgson falls beyond the pale. »

An employee may refer such a grievance to adjudication by filing with the Registrar of Chief Adjudicator<sup>66</sup> of the Public Service Staff Relations Board and serving upon the employer a notice,<sup>67</sup> not later than the twentieth day after :

- (a) the day on which he received a reply at the final level of the grievance process ;<sup>68</sup> or
- (b) the last day on which the employer was required to reply to the grievance process under section 43 of the regulations.<sup>69</sup>

He must attach to the Form GI, a copy of the grievance that he had submitted to his immediate supervisor or local officer in charge, or the first level grievance.<sup>70</sup> However, the time prescribed for referring the grievance to adjudication may be extended (i) either by agreement of the parties ; or (ii) by the Chief Adjudicator ; or (iii) by the Staff Relations Board.<sup>71</sup>

<sup>65</sup> Board File 166-2-19 (1967), at 6.

<sup>66</sup> PSSRB Regulations and Rules of Procedures (1967), Sec. 45 (1).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, Sec. 45 (1) (a).

<sup>69</sup> *Ibid.*, Sec. 45 (1) (b).

<sup>70</sup> *Ibid.*, Sec. 45 (2).

<sup>71</sup> *Ibid.*, Sec. 55.

If the grievance is one which involves an interpretation or application of a Collective Agreement or an arbitral award, the Form GI must contain a statement by an authorized representative of the bargaining agent<sup>72</sup> for the employee that the bargaining agent (a) approves of the reference of the grievance to adjudication, and (b) is willing to represent the employee in the adjudication proceedings.

#### **Approval of the Bargaining Agent**

A casual reading of Sections 90 and 91 (a) of the Act, gives an impression that the Legislature was very generous in permitting « *any employee* » (whether a Union or non-Union) to present grievances, but in effect it was not so liberal.

A grievance regarding 'disciplinary action' resulting in discharge, suspension or financial penalty, may be referred by an employee without the prior approval of a bargaining agent. In such cases, the aggrieved employee may not necessarily be represented by his bargaining agent. He may be represented by his own counsel or, if he so chooses, he may represent himself. In practice most employees in disciplinary cases are, however, represented by the appropriate union or bargaining agent. In many private sector jurisdictions, an aggrieved employee may be assisted by his co-workers in presenting and processing a grievance at the different levels of the grievance procedure but, it is doubtful that an aggrieved employee could enforce the arbitration process without the assistance of the Union.

An individual employee, as stated earlier, is expressly debarred from presenting or filing a grievance, if the grievance relates to the interpretation or application in respect to him of a provision of a collective agreement or an arbitral award, unless he has obtained a formal approval<sup>73</sup> of the bargaining agent. A grievor can be represented at the adjudication process only by the bargaining agent of the unit. The adjudicator has no power to decide such a grievance, however meritorious it may be. In *Hislop vs Treasury Board*,<sup>74</sup> the Chief Adjudicator dismissed the grievance, without hearing, because there was no proper approval by the bargaining agent. In this case, the Public Service Alliance, the bargaining agent for the employee, had written to the Registrar :

« The alleged grievance submitted by Mr. Hislop is not one which qualified for adjudication. *Even if this were not true, the Alliance*

<sup>72</sup> *Ibid.*, Sec. 45 (3)

<sup>73</sup> PSSRB Regulations and Rules of Procedure, Sec. 45 (3).

<sup>74</sup> *Hislop vs. Treasury Board*, Adj. File : 166-2-117 (1970).

would not be prepared to support the adjudication of this particular complaint because we are satisfied that the decision made by the department at the fourth level was both proper and fair ». <sup>75</sup>

The approval under Section 91 of the Act must be of the bargaining agent for the unit with which the grievor is employed and not of any other bargaining agent or Union. <sup>76</sup>

In the *O'Sullivan* <sup>77</sup> case again, the Chief Adjudicator Jolliffe dismissed the grievance (without hearing) because the bargaining agent had declined to approve the reference or represent the employee. Not only the bargaining agent should approve the grievance at the time of filing it for adjudication, but it must also continue to support the grievance till the final disposal by the Adjudicator <sup>78</sup>. If the bargaining agent withdraws its consent at any time during the adjudication proceedings, the reference to adjudication fails <sup>79</sup>.

In *Dooling vs. Treasury Board* <sup>80</sup>, the grievance was referred to adjudication and the Public Service Alliance, the bargaining agent, signed the standard approval of the reference to adjudication and a statement that it was willing to represent the employee in the adjudication proceedings in August 1970. On December 14, 1970, one day prior to the fixed day for the hearing, the Alliance, wrote to the Registrar of the PSSRB withdrawing its support of the grievance on the grounds that the grievance was no longer qualified for adjudication under Section 91 of the Act. On the basis that the approval had been withdrawn, the grievance was dismissed as having no legal reference.

The right of the bargaining agent to *withdraw*, having once given its consent to the reference to adjudication, and having once consented to represent the grievor in the adjudication proceedings, may give rise to serious problems. It may raise a question of *fair representation*. A subsequent withdrawal of support may be in bad faith and unjustified. Does it mean that bargaining agent has unfettered discretion in consenting and withdrawing its approval to a grievance of this nature? Would it not amount to a denial of « natural justice » to an individual employee?

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<sup>75</sup> The reference to this letter was made in the case.

<sup>76</sup> *Hislop vs. Treasury Board, Supra.*

<sup>77</sup> *O'Sullivan vs. Treasury Board, Adj. File : 166-2-380 (1971).*

<sup>78</sup> *Dooling vs. Treasury Board, Adj. File : 166-2-308 (1971).*

<sup>79</sup> *Ibid.*

<sup>80</sup> Adj. File : 166-2-308 (1971).

The Act has nowhere given to the bargaining agent the right to withdraw its consent, once properly given, as has been exercised by it in the above cases. Section 40 of the Act does give the bargaining agent an exclusive right « to represent an employee in the interpretation or application of a collective agreement ». Does the right of exclusive representation to the bargaining agent give it a power to 'veto' a grievance of an individual employee ?

The *Public Service Staff Relations Act* deals with collective bargaining. The collective agreement has been entered into by the bargaining agent, not by an individual employee. The interpretation of that agreement, in contrast to a grievance relating to discipline, is something in which collectivity has a primary interest. Therefore, the bargaining agent must screen all grievances relating to the interpretation of collective agreements, since these involve questions of policy affecting the employees collectively. The screening by the bargaining agent, however, should take place *prior to its initial approval and not thereafter*.

Once the approval and willingness has originally been signified by the bargaining representative, the grievor has an acquired right to the reference to adjudication, and no withdrawal by the bargaining agent should deprive him of this right<sup>81</sup>. This is common practice wherever a grievor is required to take prior permission of the third party, before instituting a claim. Requirement of continuing willingness on the part of the bargaining agent to represent the grievor may, in some cases, cause a serious hardship to an individual employee.

In *Hoogendoorn's*<sup>82</sup> case, the Supreme Court of Canada quashed the arbitration award on the ground that it constituted a *denial of natural justice*<sup>83</sup>. In that case an employee was discharged for refusal to consent to deduction of union dues. He had not been represented at the arbitration hearing which decided on the interpretation of the relevant clause of the collective agreement. With the development of mighty unions, like the mighty corporations, protection to the rights of an individual member is

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<sup>81</sup> The learned adjudicator Perry MEYER, however, rejected this argument, and required a continuing approval.

<sup>82</sup> *Hoogendoorn vs. Greening Metal Products and Screening Equipment Co., and the United Steel Workers of America*, 1968 S. C. R. 30.

<sup>83</sup> Adjudicator MEYER, in *Dooling* case, rejected the decision of the Supreme Court of Canada on the ground that in *Hoogendoorn* case, there was a direct conflict of interest between the employee and his association.

of vital importance. A collective agreement or arbitral award is applicable and binding on all employees in the bargaining unit and not only on the members of the Union<sup>84</sup>. A non-Union employee or an employee who has lost the favour of his Union *bosses at least theoretically*, would have a difficult time in getting the approval of the bargaining agent, as required under sections 90 and 91. Realization of the fact that the non-Union employee is not likely to get the approval of the bargaining agent may weigh heavily in the attitude of the employer against the non-Union employees. Would not it amount to forcing indirectly almost a « closed shop », though not designed in the policy of the Act ?

This situation may, perhaps be supported from the standpoint of view of collective nature of collective agreements and arbitral awards. Again, this may be an effective technique to discourage frivolous use of adjudication machinery.

Under Section 2 (p) of the Act « grievance » means a complaint presented by *an employee*. Section 91 again emphasizes that *only an employee* may file a grievance. Thus, it is undisputed, that the right to file grievance is vested only in an employee. The bargaining agent, if it so chooses may null the grievance by refusing its approval but, it cannot file a grievance on its own initiative, even on behalf of an employee.

## SCOPE OF ADJUDICATION

### Individual Grievances

An individual grievance to merit reference to the adjudication, under the Act, must belong to either of the two categories : (i) a grievance regarding the interpretation or application in respect of him of a provision or a collective agreement or arbitral award, or (ii) a grievance regarding disciplinary action resulting in discharge, suspension, or a financial penalty.

Any matter which does not fall within these two categories, is not subject to adjudication. Thus, grievances arising by the interpretation or application in respect to an employee of a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with the terms and conditions of employment, are

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<sup>84</sup> PSSRA, Sec. 58.

<sup>85</sup> *Hislop vs. Treasury Board*, Adj. File : 166-2-117 (1970).

excluded from the purview of adjudication<sup>86</sup>. On such matters, the grievor has no recourse but to accept the decision taken on the grievance at the final level of the departmental grievance process<sup>87</sup>. It means that a grievor has to accept the employer's unilateral decision, however unsatisfactory or unjust it may be. The exclusion of certain grievances from the scope of adjudication defeats the basic purpose of the enactment — « a region of equity » to public employees. A study of some important cases of adjudication on this point reveal that the fears are not unfounded.

It is, of course, clear that the classes of grievances that may be referred to adjudication under subsection (1) of section 91 of the Act are not as extensive as those that may be presented under subsection (1) of section 90 to the grievance process<sup>88</sup>.

A distinction has been drawn by the legislature between those « rights » which can be protected through the grievance procedure and those which can be protected through adjudication. Explaining this distinction, Chief Adjudicator H. W. Arthurs, as he then was, has observed :

« It is evident that Parliament could have given a broad mandate to adjudicators to hear and decide all matters which can be made the subject of grievances. Instead, the legislation specifically limits adjudication to grievances involving either the administration of the collective agreement, or disciplinary action, although an employee has the right to grieve where his interests are affected by the interpretation or application. . . or a provision of a statute, or a regulation, by-law, direction or other instrument. . . dealing with terms and conditions of employment. »<sup>89</sup>

Under Section 91 (1)(b), the referring of a grievance to the Adjudicator is valid only when the grievance relates to disciplinary action resulting in discharge, suspension or financial penalty. A grievance must fulfil both the requirements before an adjudicator can exercise jurisdiction over those grievances.

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<sup>86</sup> These grievances can be presented to « Grievance Process » under Section 90 of the Act, but there is no mention of them under Section 91. Section 91 of the Act is exhaustive and limiting in nature. See *Segodnia and Kunder* case, Adj. File : 166-2-23 (1968).

<sup>87</sup> PSSRA, Sec. 95 (2).

<sup>88</sup> *Caron vs. Her Majesty in Right of Canada as represented by the Treasury Board*, Board File 168-2-2 (1968). (Decision of the Board U/S 23 of the Act).

<sup>89</sup> *Segodnia and Kunder vs. Treasury Board*, Adj. File : 166-2-23, at 2 (1968).

It must be a disciplinary action. Thus, a discharge or suspension which is not a result of disciplinary action is not adjudicable. At the same time, a disciplinary action which does not end in discharge, suspension or financial penalty is also not adjudicable.

In a series of cases, adjudicators, have encountered problem of special difficulty when grievor's reference to the adjudication was objected to by the employers on the ground that the action complained had been taken under the *Public Service Employment Act* and, therefore, was not adjudicable. Whether a grievance is referable to adjudication or not under the Act is to be decided by the Adjudicator<sup>90</sup>. The Adjudicator, for this purpose, may have to hold a regular hearing<sup>91</sup> on merits of the case to find out whether the fact, the action of the employer, amounts to disciplinary action, causing in result a discharge, suspension or financial penalty.

The mere assertion by the employer that no disciplinary action was involved, however, is not sufficient and that, where it was established by evidence that 'disciplinary action' has in fact been taken under the *guise*

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<sup>90</sup> Section 95 (2) of the Act imposes a specific responsibility on the adjudicator, to determine whether he has a jurisdiction or not before deciding a grievance. It reads :

- (2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award :
- (3) Where
  - (a) a grievance has been presented up to and including the final level in the grievance process, and
  - (b) the grievance is not one that under Section 91 may be referred to adjudication,

the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon.

<sup>91</sup> *Caron vs. Treasury Board*, Adj. File : 166-2-1 (1967), at page 1, the Chief Adjudicator stated :

« In particular, I felt that *without hearing the facts of the case, I was unable to determine* whether Mr. Caron was, as he claimed, grieving against « disciplinary action resulting in discharge ». The mere contrary assertion by the employer, describing its action as a failure to appoint him to a permanent position following a period of probation, did not, in my view, relieve me of the duty to decide, both as a legal and as a factual matter, what had happened. » (emphasis added)

The practice of holding hearing to determine the jurisdiction and true nature of the case was confirmed by the Board in *Caron* case, Board File : 168-2-2 (1968). It said, « The true situation can be determined only upon a review of all the facts of the particular case. . . We find, therefore that the Chief Adjudicator acted within its jurisdiction in hearing the facts of the case.

of rejection or probation, then it is the reality and not the form of the action taken which determines whether or not the case is adjudicable under Section 91 of the *Public Service Staff Relations Act* <sup>92</sup>.

In *Caron's case*, Chief Adjudicator Arthurs while rejecting the employer's plea of « failure to appointment », observed :

«The statute gives an employee the right to an adjudication of a disciplinary action taken against him which leads to his discharge. This right is not to be thwarted by the mere assertion of the employer that no question of discipline arises; neither is it to be frustrated by a razor-thin semantic distinction between 'discharge' and 'failure to appoint following probation'.<sup>93</sup>

Not every termination of employment is disciplinary. Under the *Public Service Employment Act*, there may be lay-offs due to lack of work <sup>94</sup> or there may be rejections and probations <sup>95</sup>, release by reason of incompetence or incapacity <sup>96</sup> or even declaration of abandonment <sup>97</sup>, none of which is adjudicable unless it is shown that the action taken was in reality disciplinary in the garb of legal format <sup>98</sup>, that is, if the motive of the employer in taking action was improper and malice.

The adjudicators are of the opinion that, where it is established by the grievance itself or by the evidence at the hearing that in fact the case is one falling within the scope of Sections 28, 29, and 31 of the *Public Service Employment Act*, and that the action taken against the employee was not in reality 'disciplinary action' then an adjudicator lacks jurisdiction and the employee cannot be given relief under the *Public Service Staff Relations Act* <sup>99</sup>.

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<sup>92</sup> *Caron case, Supra.*

<sup>93</sup> *Ibid.*, at 13.

<sup>94</sup> *Public Service Employment Act*, C. 71 (1966-67), Sec. 29.

<sup>95</sup> *Ibid.*, Sec. 28.

<sup>96</sup> *Ibid.*, Sec. 31.

<sup>97</sup> *Ibid.*, Sec. 27.

<sup>98</sup> See generally *Caron cases*, Adj. File : 166-2-1 and Board File : 168-2-2 (1968). See also *Lafleur case*, Adj. File : 166-2-397 ; *Fisher case*, Adj. File : 166-2-359.

<sup>99</sup> See for example : *Caron case supra* ; *Kosiday vs. Treasury Board*, Adj. File : 166-2-26 (1968) ; contrary see *Morrison vs. Dept of National Revenue*, Adj. File : 166-2-18 (1968).

## NON-ADJUDICABLE GRIEVANCES

On the basis of Section 91 (1) (b), that an adjudicator has no jurisdiction in such cases unless the action complained was disciplinary action resulting in discharge, suspension of a financial formality, the adjudicators have held that the following grievances among others are not adjudicable under the provisions of the Act and hence denied the relief : —

1. A written reprimand, not involving any financial penalty <sup>100</sup>.
2. Alleged inequities or discrepancies in classification of reclassification or conversion to a new pay scale <sup>101</sup>.
3. Denial of promotion (although denial of an increment could, in certain circumstances, constitute disciplinary action) <sup>102</sup>.
4. Refusal of a special holiday when the refusal was not personal in its application but general throughout the public service <sup>103</sup>.
5. Allegedly unfair application or interpretation of Public Service Terms and Conditions of Employment Regulations <sup>104</sup>.
6. Alleged discrimination in competitions conducted by the Public Service Commission requiring a language qualification <sup>105</sup>.
7. Alleged improper treatment with respect to sick leave, where it appeared, inter alia, that the grievance originally was not one in respect of which no administrative procedure for redress is provided in or under an Act of Parliament <sup>106</sup> ;
8. The alleged violation of a rule relating to overtime compensation appearing in a « personnel manual » used within a department is not an adjudicable grievance, since it does not relate to any provision in a collective agreement <sup>107</sup>.
9. Where it is clear on the face of the record that an adjudicator has no power to grant relief <sup>108</sup>.

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<sup>100</sup> *Turner vs. The Treasury Board*, File : 166-2-25 (1968) *Barton* case, Adj. File : 166-2-202.

<sup>101</sup> *Beaulieu vs. The Treasury Board*, adj. File : 166-2-14 (1967) ; *Segodnia and Kunder*, Adj. File : 166-2-23 (1968) ; *McLaughlin vs. Treasury Board*, Adj. File : 166-2-29 (1968), and *Greenwood vs. Treasury Board*, Adj. File : 166-2-65 (1968) ; *Frizzell*, adj. file : 166-2-149 (1968) ; *Winters* Adj. File : 166-2-292.

<sup>102</sup> *Kosiday vs. Treasury Board*, File : 166-2-28 (1968) ; See also the *Public Service Alliance of Canada vs. Treasury Board*, Adj. File : 166-2-36 (1968).

<sup>103</sup> *Kennedy and Foster vs. Treasury Board*, Adj. File : 166-2-15 (1968).

<sup>104</sup> *Large vs. Treasury Board*, Adj. File : 166-2-77 (1968).

*Gust vs. Treasury Board*, Adj. File : 166-2-79 (1968).

<sup>105</sup> *Gow vs. Treasury Board*, Adj. File : 166-2-70 (1968) ; *Noble vs. Treasury Board*, Adj. File : 166-2-26 (1968) ; *Kosiday* case, *supra*.

<sup>106</sup> *Vezina vs. Treasury Board*, Adj File : 166-2-67 (1968).

<sup>107</sup> *Bellemare vs. Treasury Board*, Adj. File : 166-2-91 (1969).

<sup>108</sup> *Hislop vs. Treasury Board*, Adj. File : 166-2-177 (1970).

The limited scope of adjudication under the Act, with corresponding limited jurisdiction of the Adjudicators has in many situations created a feeling of uneasiness for both the grievors and the adjudicators. The adjudicators, in some cases, have found evidence of apparent injustice, but at the same time could not grant any relief to a grievor because of the limitation imposed on their jurisdiction under the Act. On occasions the adjudicators have taken liberty of expressing their feelings of uneasiness, with a hope that the employer may voluntarily undo the wrongs they have committed against their employees. For example :

In the case of *Segodnia and Kunder*<sup>109</sup> the Chief Adjudicator, Professor Arthurs, referred to the apparent irrationality of conversion rules and urged « that further consideration be given by management of its own accord to the making of an adjustment to avoid the perpetuation of unfairness ».

In *Klingbell vs. Treasury Board*<sup>110</sup>, Adjudicator Martin stated unequivocally that « undoubtedly the grievor has been treated harshly ». The Adjudicator further observed :

« I would like to note that it is regrettable that the representations made to the members of Parliament concerning the purposes of this section have been so obviously and flagrantly abused in their application in the instant case. »

Recently in the case of *Newtin vs. Nabinal Film Board*<sup>111</sup>, the Chief Adjudicator Jolliffe held :

« It is clear that the « devaluation » of Mr. Newtin was based on *complaints I have found to be almost ground-less*. . . It is not, however, 'reversible error' — that is, the error is not adjudicable under Section 91 (1) of the Public Service Staff Relations Act. The statute does not empower an adjudicator to correct what he considers to be management errors except where a collective agreement is violated or misapplied, or where a major disciplinary penalty is wrongly imposed. »  
(Emphasis added)

The Adjudicator, however, expressed :

« . . . it can be inferred that Mr. Newtin has had what is commonly called a 'raw deal', but neither the findings nor the inference bring the matter within the scope of disciplinary action. »

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<sup>109</sup> *Segodnia and Kunder vs. Treasury Board*, Adj. File : 166-2-23 (1968).

<sup>110</sup> Adj. File : 166-2-88 (1969).

<sup>111</sup> Adj. File : 166-2-288 (1970).

The major Unions of Public Employees, the Public Service Alliance of Canada and the Professional Institute of the Public Service of Canada have strongly resented against the limitation imposed on the adjudication of grievances<sup>112</sup>. In Alliance's word : « The most objectionable question with regard to grievance/adjudication machinery in the PSSRA is the limited scope of adjudication »<sup>113</sup>. A careful study of adjudication cases, since the establishment of adjudication in Federal Public Service reveals that the resentment and frustration of Unions with the limitations on adjudication, have some genuine cause for fear and apprehension and deserve serious consideration.

The question arises if a grievance is worthy of being processed through the « grievance process », what makes it unworthy for « adjudication » ? Did the Parliament desire to keep some arbitrary powers and unfettered discretion in the Government officers in the sphere of employer-employee relations ?

In *Derbyshire case*, the Chief Adjudicator Jolliffe, has made a very significant observation that « fewer cases will come to adjudication when more serious and bona fide efforts are made to resolve a dispute at the final level of the grievance process »<sup>114</sup>. The implication of the observation is obvious, that the grievance process is not being given a fair trial. It is being used as a formality or « eye wash » in some cases. Particularly, in those cases where grievances are not referable to adjudication, that attitude of the management is bound to be indifferent and arbitrary ; this would not accomplish the legislative effort « to establish what might be termed the 'rule of law' in place of unfettered administrative discretion ».

Generally in the private sector, no such limitation is found on arbitration of grievances. Arbitrators under most of the collective agreements have jurisdiction to decide whether a matter is arbitrable on a reference made to arbitration. Further, it may be pointed out that in the United States Federal Service, the Executive Order 11491 makes no distinction between matters which may be subject matter of grievances and those which may be referred to arbitration. Section 14 of the Executive Order 11491 titled 'Arbitration of Grievances' reads as follows : —

<sup>112</sup> See Brief of the Public Service Alliance of Canada submitted to the Legislative Review Committee, Vol. 2 (1971) and the Brief of the Professional Institute of Public Service of Canada, submitted to the Legislative Committee (1971).

<sup>113</sup> Brief of the Alliance, *Supra* at 111.

<sup>114</sup> *Derbyshire vs. The Treasury Board*, File : 167-2-5 (1970) at p. 8.

Negotiated procedure may provide for the arbitration of employee grievances and of disputes over the interpretation or application of existing agreements. Negotiated procedure may not extend arbitration to changes or proposed changes in agreement or agency policy. Such procedures shall provide for the involving of arbitration only with the approval of the labor organization that has exclusive recognition, and in the case of an employee grievance, only with the approval of the employee. The costs of the arbitrator, shall be shared equally by the parties.

Ullman and Begin<sup>115</sup>, however, have pointed out that in the U. S. federal sphere only 20 per cent of the contracts have provided for all complaints both to the grievance procedure and arbitration. About 22 per cent of the contracts with binding arbitration, however, have excluded one or more specific issues from arbitration. The issue most frequently excluded from arbitration were wage adjustments, seniority and promotions, employee benefit plans and plant administration.

It has been suggested that the *Public Service Staff Relations Act* should be amended to provide that all matters which can be grieved upon can be referred to adjudication<sup>116</sup>. The broadening of the jurisdiction of the adjudication process may be objected to on the ground that some of the employees would like to refer every petty grievance to adjudication. In order to prevent the adjudication machinery being flooded with frivolous grievances, it has been proposed that « an employee should only be able to refer his grievance to adjudication if he has the support of, and is represented by his bargaining agent, except for cases involving major disciplinary action, where he should have the choice of being represented by his bargaining agent or a lawyer of his choosing »<sup>117</sup>.

### Policy Grievances

A special category of adjudication is provided for cases, where it is recognized that a dispute may develop which would not be appropriate as

<sup>115</sup> ULLMAN and BEGIN ; « The Structure and Scope of Appeals Procedure for Public Employees », *Ind. & Lab. Rel. Rev.*, no 3, 1969-70, p. 323.

<sup>116</sup> Both Public Service Alliance and Professional Institute of Public Service have strongly demanded that Section 91 should be amended to enlarge its scope, in their Briefs submitted to the Legislative Review Committee. Alliance's Brief, on this point, has concluded : « In view of the difficulties which the limited scope of adjudication creates for employees and bargaining agents, it is proposed that PSSRA be revised to provide that *all matters which can be grieved upon can be referred to adjudication.* »

<sup>117</sup> Brief of the Professional Institute, cited *Supra*, at 112.

the subject matter of a grievance by an individual employee but nevertheless require third party determination. The adjudication of this special category of cases, popularly known as « policy grievances » is provided under Section 98 of the Act. It provides, where either the employer or a bargaining agent seeks to enforce an obligation that is alleged to arise out of a collective agreement or arbitral award, or where there has been a failure to observe or carry out the obligation, then, either party may refer the dispute for adjudication. Reference under Section 98 must be heard and determined by the Chief Adjudicator and not by any other adjudicator.

There is an important qualification for « policy grievance » that no such case be referred under Section 98 if the obligation alleged is one which may be the subject of an individual employee grievance.

If the obligation alleged is one, the enforcement of which may be the subject matter of a grievance of an employee, (in the bargaining unit to which applies the collective agreement from which the obligation arises), the Chief Adjudicator has no jurisdiction to hear a complaint of the bargaining agent under Section 98 of the Act. The Act gives the Chief Adjudicator no power whatsoever to decide that a case may be more conveniently or appropriately heard and determined under Section 98 when it is clear that the same dispute would be adjudicable under Section 91 on the behest of an individual employee <sup>118</sup>.

Though there have been comparatively few <sup>119</sup> references of « policy grievances » under Section 98, they, however, pose an important question of public policy. The scope of « policy grievances » has been a controversial issue, even in other jurisdiction of labour relations. The basic problem arises in a situation where the alleged obligation under the agreement may also be a subject of an individual grievance but, the individual employee, for one reason or the other, is not willing to or is afraid of processing the grievance. The union, however, feels that the outcome of the grievance is vital for a group or all the employees under the bargaining unit. The question arises, should an individual employee be given, virtually, a power to « veto » in these circumstances? On the other hand, if it is a « policy grievance », an individual employee cannot file a grievance

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<sup>118</sup> *The Professional Association of Foreign Service vs. Treasury Board*, File : 169-2-7 (1970).

<sup>119</sup> So far there have been only 12 references under Section 98, all of them were filed by the bargaining agents, 4th Annual Report of the PSSRB 34 (1970-71).

under Section 91 of the Act, even though he may personally be affected by the action of the employer. In a recent case, *Tulk vs. Treasury Board*<sup>120</sup>, the grievor has alleged that the department brought into effect a *new parking* system without notification to or consultation with a representative of the Public Service Alliance as required by Art. 36 of the Agreement, thereby the grievor has lost his parking privilege.

In support of the Grievor (individual grievance) the Union has strongly contended that the provision of Section 98 of the Act, establishes a procedure by which the bargaining agent can protect its interest, when affected ; as an institutional grievance, for example, the check-off of dues and appointment of shop stewards. But it was not intended that Section 98 should take away the right of an individual employee to grieve when his own interests have been affected by the act of the employer.

Adjudicator Professor Abbott dismissed the grievance on the ground that it was not a grievance which could be referred to adjudication under Section 91 of the Act. Because the failure to consult, which has been alleged, could only be a breach of duty owed to the Union and not to the grievor as an individual. The duty to consult under the provisions of the collective agreement was a duty owed to the Alliance, and not to its individual members.

For a better appreciation of the implications of 'policy grievance', the views of the Arbitrators in the private sector jurisdictions are significant. In *Canada Trailmobile Ltd*<sup>121</sup>, the Board of Arbitration, with Professor Adell as Chairman, held that the policy grievance was permissible, because it was general in nature, since it was not based on the personal attributes or behaviour of an individual employee but, rather on a problem of interpretation. In *Township of Vaughan*<sup>122</sup>, the issue arose

<sup>120</sup> *Tulk vs. Treasury Board*, Adj. File : 166-2-404 (1971).

<sup>121</sup> 19 L. A. C. 227 (1968), The Union lodged a policy grievance alleging that the company was improperly scheduling over time when an employee was on lay-off. Apparently the laid-off employee would not grieve because he had a better job while on lay-off. The Section of the collective agreement defining « policy grievance » stated that :

« it is the intention of the parties that the procedure shall be reserved for grievances of general nature for which the regular grievance procedure for employee is not available — that it shall not be used to by-pass the regular grievance procedure ».

The above provision is very similar to Section 98 language.

<sup>122</sup> Unreported (1969).

out of a situation that involved one employee at the time, but the concerned employee did not lodge an individual grievance. Therefore, the Union lodged a policy grievance asking for a declaration about the practice of the company in scheduling *one employee* from Tuesday to Saturday, rather than the normal five-day work week from Monday to Friday. The Policy Clause in the collective agreement has expressly provided that this procedure

« may not be used with respect to a grievance directly affecting an employee or employees and the regular grievance procedure shall not be thereby by-passed. »

The Arbitration Board, with Weatherhill as Chairman, by majority vote, held that the 'policy grievance' was arbitrable.

The above two decisions in *Canadian Trailmobile* and *Township of Vaughan* suggest that unions can grieve in all situations through the policy grievance procedure, though individual relief would only be available on a grievance lodged by an individual employee.

In the *Burlington Board of Education*<sup>123</sup> the Arbitration Board took a hard line approach. It disallowed a policy grievance in situation where an individual grievance could be brought effectively. Thus an individual employee was given a veto where a situation directly affecting would be arbitrable.

In a more recent case of *Weston Bakeries Ltd.*<sup>124</sup>, Professor Weiler held :

« The concluding sentence does not say that the Union may not institute a union grievance where an individual could also grieve. It is *designed to protect the right of an individual to grieve, not to protect his right to veto* the bringing of any grievance in a situation falling within the first sentence of Art. 8.06. It would prevent the union bringing a policy grievance for a declaration where the individual wanted to grieve for specific remedy. »

The above decision clearly indicate that the majority of the Arbitrators in a private sector jurisdiction would tend to allow a 'policy grie-

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<sup>123</sup> 18 L. A. C. 347, the decision in this case was very similar to that of Chief Adjudicator Jolliffe in *Professional Association of Foreign Service, Supra*.

<sup>124</sup> *Weston Bakeries Ltd. and Milk and Bread Driver, Dairy Employees*, (September 11, 1970 — Professor P. C. Weiler, Arbitrator).

vance' even though the situation may be the subject matter of a grievance by an individual employee, if the employee concerned is not willing to lodge the grievance. The theory is based on « quite plausible reconciliation of competing policies involved in the problem of Union grievance »<sup>125</sup>. An individual employee cannot have a veto over policy grievance where the Union has a legitimate reason for obtaining an authoritative arbitral decision about the matter.

The position of adjudicators under the *Public Service Staff Relations Act*, however, is different than that of the arbitrators in the private sector. In the sphere of Public Service, the limitation on « policy grievance » is statutorily provided, whereas in the private sector, the scope of 'policy grievance, is to be inferred from the policy grievance' clauses in the collective agreements, which differ from agreement to agreement. However, taking a practical view of the situation there seems to be no reason for creating an artificial barrier between individual and policy grievance. Individual and policy grievance is, indeed, not exclusive to each other. But, in the Federal Public Service, this can only be remedied by amending the legislation and not by the interpretation of adjudicator of be an agreement of the parties.

### Group Grievances

The *Public Service Staff Relations Act* has made no mention of « group grievances ». This, however, remains to be determined, from the decided cases, whether the adjudicators have allowed « group grievances » as a matter of practice or not. If so, to what extent and under what circumstances.

Basically, an individual employee has a right to grieve his own individual grievance. The definition of the term grievance does not indicate that the Parliament wanted to exclude « group grievance » from the preview of adjudication. « Grievance », under Section 2 (p) of the Act, « means a complaint in writing presented in accordance with this Act by an employee on his own behalf or on behalf of himself and one or more other employees ». In *Cain vs. Treasury Board*<sup>126</sup>, Adjudicator Perry Meyer while interpreting Section 2 (p) observed :

Were it not for Section 2 (p) of the Act, an employee could only grieve on his own behalf, and could not include the claims of the

<sup>125</sup> *Ibid.*

<sup>126</sup> *Cain vs. Treasury Board*, Adj. File : 166-2-364 (1971) at 2.

other employees even with their written consent appended to his grievance. It is Section 2 (p) which permits this procedure.

The adjudicator, however, made it very clear that an employee cannot grieve on behalf of other unnamed employees who may have no awareness of the proceedings instituted<sup>127</sup>.

Chief Adjudicator Martin (as he then was) while admitting a 'group grievance' in the case of *J. G. Levesque et al.* held :

« The Act confers the right upon a group of grieving employees, alleging the same factual circumstances and alleging an identical misinterpretation or misapplication of a Collective Agreement by the employer, to have a single grievance processed to adjudication, assuming that the grievance is one of those that falls within the ambit of Section 91 of the Act. »<sup>128</sup>

The Chief Adjudicator Martin, in this case limited the disposition of the grievance to the five grievors only, on the ground that the other employees must be specifically identified in the grievance<sup>129</sup>.

« (It) is incumbent upon the Grievor who is acting as a representative for other grievors, to clearly and precisely specify the other joint grievors. »<sup>130</sup>

In the *Southern* case it was held that the grievance in that case pertained solely to the grievor because there there was no identification of the employees involved apart from the grievor<sup>131</sup>.

The decisions in *J. G. Levesque* and *Southern* have required that a « group grievance », must « specifically identify », or « clearly and precisely specify » the other employees requiring disposition of the grievance. But the terms « specifically identified » and « clearly and precisely specify » were left vague and unexplained. It was in *Felix Bourget* that Adjudicator Martin spelled out these terms when he observed that « although a right of joint grievance is conferred under the provision of the *Public Service Staff Relations Act*, unless the joint grievors are identified by name a

<sup>127</sup> *Ibid.*

<sup>128</sup> *J. G. Levesque & et al. vs. Treasury Board*, Adj. File : 166-2-104 (1969) at 1.

<sup>129</sup> *Ibid.*, at 2.

<sup>130</sup> *Southern vs. Treasury Board*, Adj. File : 166-2-103 (1969), at 1.

<sup>131</sup> *Ibid.*, at 2.

*grievance* signed only by one grievor employee is deemed to be a single and a collective grievance »<sup>132</sup>.

Thus, the decision in *Felix Bourget* makes it clear that the specification of the joint grievors is to be « by name ». It is not clear from the decision whether the adjudicator would require that all the grievors must sign the grievance. In *W. F. Dobson*<sup>133</sup>, Professor Abbott has discussed at length the whole issue of « group grievances » and has come to the conclusion that it is only the named grievor who is entitled to the benefit of, and is bound by, the adjudicator's decision. It has been strongly stressed that the adjudicators « should be hesitant to make determinations seriously and directly affecting the interest of employees who had no notice of, and opportunity to participate in, the grievance process »<sup>134</sup>.

Adjudicator Weatherill has expressed the view that there should be an exception to the rule (specifying the other grievors by name), where the evidence shows that the grievance relates to a small, easily identifiable group, if there are no variables affecting individual cases which would have any material effect<sup>135</sup>. He is of the opinion that « no useful purpose would be served by requiring a multiplicity of grievances where one would do »<sup>136</sup>. It is, however, doubtful that Adjudicators Meyer, Martin and Abbott would follow that approach.

It follows that the « group grievance's » are allowed to be adjudicated under the provisions of the Act, but most of the adjudicators would require that all other employees interested in the disposition of the grievance must be specified by name in the grievance. Some of the adjudicators may even require that the grievance must be signed by all the specified grievors.

However, if both parties agree, the adjudicator may make decisions binding with respect to other employees, even though their grievance is not formally forwarded to adjudication<sup>137</sup>.

The adjudicators are, however, reluctant to encourage unnecessary multiplicity of grievances. Chief Adjudicator Jolliffe has strongly voiced

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<sup>132</sup> *Felix Bourget vs. Treasury Board*, Adj. File : 166-2-157 (1969), at 1.

<sup>133</sup> *W. F. Dobson vs. Treasury Board*, Adj. File : 166-2-391 (1971).

<sup>134</sup> *Ibid.*, at 17.

<sup>135</sup> *Lasek vs. Treasury Board*, Adj. File : 166-2-153 (1969).

<sup>136</sup> *Ibid.*, at 7.

opposition to the multiplicity of references to the adjudication. He said « repetition and unnecessary adjudication would amount to a waste of public funds <sup>138</sup> and resources ; a point I suggest should be kept in mind by all those to whom the *Public Service Staff Relations Act* is applicable » <sup>139</sup>. Chief Adjudicator is of the opinion that

« the result of an adjudication interpreting a collective agreement should not be regarded by either party as an isolated phenomenon to be filed away and forgotten. It is relevant when consideration is given to any similar case under the same language. If a decision is thought to be wrong in law, it can be challenged at once under Section 23 of the Act. If not, it should be accepted as part of the jurisprudence relating to the applicable language. » <sup>140</sup>

It may be pointed out that the labour Relations Legislation in other jurisdictions in Canada operate on the assumption that the bargaining agents normally handle all grievances. However, to ensure the individual employee's right to file a grievance, a provision is made in Federal <sup>141</sup>, Manitoba, N. B., Nova Scotia and P.E.I. Acts which in part, states that « any employee may present his personal grievance to his employer at any time ».

The prevailing confusion and controversy over the scope of individual grievance, group grievances and policy grievances need to be resolved affectively keeping in mind the basic purpose of the Act <sup>142</sup>. Either the statute should be interpreted liberally in the interest of individual employee, unless it interferes with the process of collective bargaining, or the jurisdiction of the bargaining agent be extended to file a grievance for and on behalf of its constituents in cases involving interpretation of collective agreement, without excluding the right of an individual employee.

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<sup>137</sup> *Beaman vs. Treasury Board*, Adj. File : 166-2-360 (1971).

<sup>138</sup> Although Section 97 of the Act has provided for sharing of adjudication expenses by the parties to the dispute, so far, it has been a « free ride » for all concerned.

<sup>139</sup> *Derbyshire vs. Treasury Road*, Adj. File : 167-2-5 (1970), at 7.

<sup>140</sup> *Ibid.*, at 6.

<sup>141</sup> *Industrial Relations Dispute Investigations Act*, C. 54, 1948, Section 26.

<sup>142</sup> « The purpose (of the Act) was to introduce some order, consistency and justice into employer-employee relations by way of collective agreements under which disputes were to be resolved in the grievance process — and as a last resort by adjudication, » Chief Adjudicator Jolliffe in *Derbyshire* case, *Supra*.

## JUDICIAL REVIEW OF THE ADJUDICATOR'S DECISION

The decision of the adjudicator is final<sup>143</sup>. The Act has made no provision for an appeal against the decision of the arbitrator. The Act has specifically ousted the jurisdiction of the courts over the decision of an adjudicator whether in form of appeal or prerogative writ<sup>144</sup>.

« Section 100 of the Act provides : —

- (1) Except as provided in this Act, every order, direction, decision, declaration or ruling of . . . an adjudicator is *final* and shall not be questioned or reviewed in any court.
- (2) No order shall be made or process entered, and no proceedings shall be taken in any court whether by way of injunction, certioraries, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain — an adjudicator in any of its or his proceedings ».

An adjudicator cannot review his own decision because the reference comes to an end as soon as a decision is handed down. However, in some cases the adjudicator retains the jurisdiction, by specifically stating in the decision itself, for purposes of calculation of quantum or relief, wages, leaves, hours etc. For example :

« If there be any difficulty regarding the quantum or the application of this decision, I may be spoken to »<sup>145</sup>.

This action does not amount to reviewing his own decision ; at the best, it may be regarded as the power to clarify the decision already given.

The statute, however, has provided another avenue to seek a review of the decision of the adjudicator, on questions of law and jurisdiction, not from a court of law, but by the Public Service Staff Relations Board itself<sup>146</sup>.

Section 23 of the Act reads : —

« Where any question of law and jurisdiction arises in connection with a matter that has been referred to — an

<sup>143</sup> PSSRA, Sec. 100.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Walsh vs. Defense Research Board*, Adj. File : 166-5-282 (1970), Chief Adjudicator Jolliffe.

<sup>146</sup> PSSRA, Sec. 23.

adjudicator pursuant to this Act, — adjudicator — or either party may refer the question to the Board for hearing or determination. . . »

This provision empowers not only the parties, but also the adjudicators to have the issue of law and jurisdiction determined by the Board. The purpose of Section 23 is to vest in the Board power (i) to review the decision of an adjudicator on specific question of law or jurisdiction in a situation where it is alleged that, because of an error in law, or by reason of an excess or failure to exercise jurisdiction, an adjudicator has come to a wrong decision<sup>147</sup> or (ii) to give guidance to an adjudicator at his request where a question of law or jurisdiction has been raised in a matter before him and he entertains a doubt as to what is law on the point in issue or as to the extent of his jurisdiction<sup>148</sup>. Thus, under Section 23 of the Act, the Board has dual role, to review the decision of the adjudication in the form of appeal and to guide the adjudicator on the issue of law and jurisdiction.

This is a unique provision where an adjudicative authority may get an issue of law and jurisdiction decided by some other authority. Normally, an adjudicative authority makes a decision even where its jurisdiction is challenged. No doubt, it is for the adjudicator to decide all questions of law and the facts involved in the reference. Section 23, however, enables an adjudicator to get the issue of law and jurisdiction decided by the Board, if he has any doubt. This can only be done prior to his own decision. It appears that the basic philosophy behind this provision may be to avoid unnecessary lengthy litigation by deciding the doubtful issues of law and jurisdiction prior to final approval. It may be pointed out, however, that provision of Section 23 is not designed to enable an interested party to obtain from the Board a declaratory or advisory ruling on any question that may arise in the course of proceedings before an adjudicator<sup>149</sup>.

Any doubt regarding the Board's power to review a decision of the adjudicator, in an appeal by the interested party, has been set apart by the Federal Court in a recent case<sup>150</sup>. The Federal Court of Appeals in *Thomas, Frost & Carlson vs. The Attorney General of Canada*, has held :

<sup>147</sup> *Amor vs. Treasury Board*, Board File : 168-2-4 & 5 (1969).

<sup>148</sup> *Ibid.* See also *Morrison vs. Treasury Board*, Board File : 168-2-3 (1969).

<sup>149</sup> *Ibid.*

<sup>150</sup> *Thomas, Frost, and Carlson vs. The Attorney General of Canada*, Federal Court of Canada, Feb. 24, 1972 (yet unreported).

« I have no doubt that the Public Service Staff Relations Board has *unrestricted authority*, under Section 23 of the Public Service Staff Relations Act, to determine any question of law arising in connection with a matter that has been referred to an adjudicator under that Act. The relevant provisions of the Act seem clear and unambiguous. »<sup>151</sup>

The Court further observed :

« There does not appear to me to be any valid reason for giving the expression « any question of law or jurisdiction » as used in this provision a restricted meaning. In particular I can see no justification for restricting the sort of question of law referable to the Board under Section 23 to the sort of question which would justify review of the decision of an arbitrator, whether statutory or consensual, on the principles applicable in *certiorari* proceedings. »<sup>152</sup>

« The interpretation of a contract is *prima facie* a question of law », the court concluded.

While denying the courts to review any decision of an adjudicator, the Parliament has vested the Board with the power of a superior court. The Board's authority under Section 23 of the Act is even wider than that possessed by a superior court in reviewing the proceedings of an inferior tribunal<sup>153</sup>. The provision for review by the Board in the Act seems to be a safety valve.

In spite of the fact that the Parliament, while giving finality to the decision of an adjudicator, has expressly ousted the jurisdiction of the Courts over their decisions, the courts in Canada, however, are likely to exercise their inherent jurisdiction. The courts may hold that a privative clause will not protect a tribunal acting in breach of the *audi-alteram* rule. Even where a privative clause is provided in the statute, the court may issue *certiorari* on the following grounds : (1) defect of jurisdiction, (2) error of law ; and (3) fraud<sup>154</sup>.

In the *Board of Health for the Township of Saltfleet vs. Knapman*<sup>155</sup>, the Supreme Court of Canada has held that a privative clause will not

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *Morrison case, Supra.*

<sup>154</sup> R. CARTER, *The Apparent Virility of Privative Clauses*, 1967 U. B. C. L. Rev. 219.

<sup>155</sup> 1956 S. C. R. 877.

prevent review in a case involving a breach of the *audi alteram partem* rule. In that case the court arrived at its decision by equating breach of natural justice with defect of jurisdiction. In the light of the apparent attitude of the courts over privative clauses<sup>156</sup>, it is most unlikely that the *Public Service Staff Relations Act* would get a special treatment by the courts.

In fact, recently, the Federal Court of Appeals disregarded Section 100 of the Act, and reviewed a decision of the Public Service Staff Relations Board, setting aside the decision of Adjudicator H. Arthurs<sup>157</sup>. In reviewing the case the court held that it has authority to substitute its own opinion in place that of the Board or the Adjudicator :

« . . . the jurisdiction of this court under Section 28 of the *Federal Court Act*, and in particular Section 28 (1) (b) is not limited to dealing with points of law which would be open if this proceeding were by way of *certiorari*, it seems clear that this court is not bound to choose between and give effect either to the interpretation put upon the collective agreement by the adjudicator or to that put upon it by the Board but has authority to substitute its own opinion and to direct that its interpretation be put into effect. »<sup>158</sup>

Thus, in spite of Section 100 of the Act, the parties can have judicial review of the decision of an adjudicator. This, of course, would be in addition to statutory review by the Board. A provision of review by the Board under Section 23, however, may substantially reduce the number of incidence of review by the courts. In this respect, the employers and unions under the Public Service are in better position than their counterparts in private sector.

#### ADJUDICATION VS. ARBITRATION (IN PRIVATE SECTOR)

The adjudication system under the *Public Service Staff Relations Act* has many unique features which distinguish it from the private sector arbitration.

#### APPOINTMENTS :

Adjudication in Public Service of Canada is statutory. The adjudicators are appointed by the Government<sup>159</sup> and hold their office at the

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<sup>156</sup> For critical — analysis on Court attitude on Privative Clauses, see *Carter, Supra* note 154.

<sup>157</sup> *Thomas, Frost and Carlson case, Supra* note 150.

<sup>158</sup> *Ibid.*

pleasure of the Governor-in-Council<sup>160</sup> Except where option is provided to the parties to name the adjudicator in their collective agreements, the parties have no choice in selecting an adjudicator of their liking. It is the discretion of the Chief Adjudicator to « refer a case to an adjudicator selected by him »<sup>161</sup>. Practically, however, the Chief Adjudicator has gradually worked out an administrative plan for referring the grievances to adjudicators. Throughout Canada, from East to West Coast, adjudicators have been appointed to whom grievances are referred occurring in their regions, except where exigencies or other circumstances require an alternative arrangement.

Whereas, in private sector arbitration, parties select an arbitrator by mutual agreement on case-to-case basis. In other words an arbitrator in the private sector is created by the parties, as has been said :

« The parties control, in an important sense, the entire arbitration process. They mutually select the arbitrator and can establish the procedure to be followed. Union-management relations have been likened to a marital relationship, frequently entered into without benefit of clergy. The arbitrator is said to be a creature of the parties.<sup>162</sup>

An arbitrator decides a grievance or interprets a clause in the collective agreement to the best of his ability and capacity. The arbitrator's decision is based on the facts on record. The arbitrator, however, is concerned, though unwittingly, regarding the acceptability of his award by both the parties because his next appointment would depend upon liking and disliking of his decision, not by one party but both. This has led many arbitrators to follow a middle path. It is said that hard liner arbitrators are not very popular and always carry a risk of losing a job (Author has no material evidence to ascertain the truth of these assertions).

Adjudicator, on the other hand, is absolutely free from these kinds of considerations. He is absolutely independent and secures and holds office under the terms and conditions of the Act, rather than on the whims of the parties, even if its cost is to be born by the parties. In this respect, an adjudicator, under the *Public Service Staff Relations Act*, has a status very close to that of a court of law.

<sup>159</sup> PSSRA, Sec. 92 Term government' has been used, here, in a general sense.

<sup>160</sup> *Ibid.*

<sup>161</sup> PSSRA, Se. 94 (2) (c).

<sup>162</sup> Freeman F. SAUGEE, *Grievance Arbitration in Public Employment*, in *Perspective in Public Employee Negotiations* 84 (Public Personnel Assn. 1969).

## STATUTORY NATURE :

Adjudication under the Act is statutory, Being a statutory body, adjudication proceedings are required, by law to be open to the public<sup>163</sup>. Whereas, arbitration proceedings are private and public is not allowed to sit in. This makes an adjudication proceeding more formal than that of arbitrations.

Adjudicators and Arbitrators function under two different sets of circumstances. An arbitrator while deciding a grievance looks only to one bargaining unit and a local union for which he has to make an interpretation. A decision of the arbitrator is not going to effect any other employment situation because of the involment of a single individual employer and the Union of its employees. But, in the Public Service, the situation is different. In the Public Service, although there are many departments and separate employers (bargaining units), yet factually, there is only *one employer*, that is, the *Federal Government*. Further, many agreements have clauses in common ; the language is either identical or similar. Although in an individual grievance there is involved only one department and one bargaining unit yet, being a government structure (basically one employer), there is much more decision, than simply deciding a controversy between litigants. In other words, an award of an adjudicator has much wider implications than an award of an arbitrator. Therefore, an adjudicator is expected to be more cautious and required to state reasons in support of his decision than a private arbitrator.

Because of the peculiar nature of public service, the adjudication of a grievance originally arising with respect to one employee in one department under an agreement with respect to one bargaining unit may have a service-wide impact. In the words of Chief Adjudicator Jolliffe :

« This is not to say that adjudicators are bound by the doctrine of *Stare decisis* or that all cases constitute binding precedents, but it does mean that some measure of consistency must be maintained in the interpretation and application of important provisions in collective agreements and also in the application of certain principles of law and practice... Incidentally, the Regulations and Rules of Procedure require that an adjudicator must state in writing not only his decision but the reasons for his decision.<sup>164</sup>

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<sup>163</sup> See New Federal Courts of Canada — A manual of Practice.

<sup>164</sup> Taken from the paper delivered by Chief Adjudicator Jolliffe at the Bi-National Conference on Public Service Collective Bargaining, at Detroit, Michigan on October 6, 1971.

This forces him to support his decision fully, with legal authorities and case law. All these factors have led to a decision of an adjudicator to be more technical, more legal, loaded with case references. Some of these awards resemble closely court decisions, in volume, and legal technicalities. Although, some arbitration decisions in private sector jurisdiction are in no way less complicated, yet by and large, arbitration awards are simply drawn.

There is another factor which cannot be ignored that, an adjudicator, being a statutory tribunal, is under the statutory obligation to discharge the function of a quasi-judicial body. Thus, an adjudication process, by its nature is more legal and formal than that of arbitration process. This however, is not to suggest that arbitration decision is less legal.

An arbitrator is required to decide the dispute involved by interpretation of collective agreement alone, whereas an adjudicator is called upon to travel much beyond the collective agreement he has to examine and consider all other laws and rules and regulations, applicable to that employee and situation, even for deciding whether he has a jurisdiction over a particular grievance or not. Thus, in fact, while deciding a grievance, an adjudicator interprets not only collective agreement but also statutes applicable to public service, such as *Public Service Employment Act*, Rules and Regulations made under the *Financial Act*, *Superannuation Act* and various other statutes applicable to different sections of public employees. Thus, legalistic approach and more legal writing is bound to reflect in the decisions of the adjudicators. Arbitrators in private sector, however, are not normally required to travel beyond the collective agreement in question.

#### STATUTORY REVIEW

There is no statutory review or appeal available against the award of an arbitrator or a board of arbitration in private sector. The arbitrator's decision is final. The Courts, however, may allow a writ of *certiorari* over the arbitration award depending upon the nature of the case. Whereas, the *Public Service Staff Relations Act* has made provision for appeal against the decision of the adjudicator on the question of « law and jurisdiction ». The appeal lies with the Public Service Staff Relations Board itself. Although Section 23 of the Act has provided for an appeal only on the question of « Law and Jurisdiction », the Courts, however, have interpreted the question of « Law and Jurisdiction », under Section 23 of the Act, in its widest sense and have thereby empowered the Board to review an ad-

judication award in its entirety<sup>165</sup>. This statutory review is in addition to the Courts' inherent power to correct errors of law on the face of the proceedings of statutory boards and tribunals through writ of *certiorari*.

#### INFLUENCE OF PRIVATE SECTOR ARBITRATION :

Under the *Public Service Staff Relations Act*, most of the adjudicators have been drawn from among the best qualified and reputed arbitrators in the country<sup>166</sup>. They have brought with them wisdom and rich experiences as well as settled norms of industrial jurisprudence. Even through the newly established system of adjudication they have provided almost equal justice to the public employees as available to their counterparts in private sector. The substantive law in the public service has begun to develop identically on the same lines. Though, issues of substantive law on adjudication, is not within the scope of this paper, yet a brief survey of adjudication cases on discipline matter would support the above contention. The private sector approach of the adjudicators has been a healthier influence on employer-employee relations in public service.

They, as adjudicators, however, found themselves much handicapped under the provisions of the *Public Service Staff Relations Act*. Their jurisdiction is comparatively limited and subject to statutory review. But, they seem to have adjusted themselves well in a new environment and in a new role. It is creditable that they have not hesitated to modify their approach to suit the peculiar situation of Public Service. It is surprising to note the unanimity one finds in the judgment of the adjudicators though, in private sector, it varies considerably.

### **La Loi concernant le service civil du Canada Le règlement des réclamations dans la fonction publique fédérale**

Avant 1967, les employés de la fonction publique fédérale n'avaient aucun moyen véritable d'obtenir le redressement de leurs griefs. *La Loi concernant le service civil du Canada* de 1961 prévoyait, cependant, un mécanisme d'appel dans les cas de promotion et de mutation, de refus d'augmentation de salaires, aussi bien que dans ceux de suspension, de rétrogradation et de renvoi. La Loi obligeait le comité d'appel à tenir une enquête sur le litige et à faire des recommandations

<sup>165</sup> See *Thomas, Frost & Carlson case*, Supra note 150.

<sup>166</sup> E. B. JOLLIFFE, Q. C., Chief Adjudicator ; W. Stewart MARTIN, Q. C. ; Professor H. W. ARTHURS, (First Chief Adjudicator) ; Professor R. D. ABBOTT ; Professor Perry MEYER ; R. J. MOIR, J. F. W. WEATHERILL ; Professor NORMAN and Professor DES COTEAUX. For their background see *New Reales* issued by the PSSRB from time to time.

à la Commission sur la façon de disposer des appels. La décision finale revenait à la Commission de la Fonction publique. Comme le comité d'appel n'était pas habilité à prendre des décisions, au mieux sa fonction demeurerait consultative.

Depuis l'adoption de la *Loi sur l'emploi dans la Fonction publique* et de la *Loi sur les relations de travail dans la Fonction publique*, en 1967, la situation a beaucoup changé. Les griefs qui donnaient lieu antérieurement à une révision du comité d'appel ont été répartis entre le mécanisme permanent de règlement des réclamations et l'arbitrage prévus à la *Loi sur les relations de travail dans la Fonction publique*, d'une part et le comité d'appel prévu à la *Loi sur l'emploi dans la Fonction publique*, d'autre part.

Des désaccords comme les nominations par « concours restreints », les promotions sans concours, les rétrogradations et les renvois pour incompétence ou incapacité relèvent encore de la Commission de la Fonction publique. La législation a prévu remède aux plaintes relatives aux suspensions, au refus d'augmentations de salaires, à la rétrogradation ou au renvoi pour inconduite au moyen du mécanisme permanent de règlement des réclamations et de l'arbitrage en vertu de la *Loi sur les relations du travail dans la Fonction publique*. La compétence du comité d'appel se limite maintenant à permettre à un fonctionnaire pris individuellement d'obtenir la révision des décisions des ministères qui ne sont pas du ressort du comité des réclamations et de l'arbitrage prévus à la *Loi sur les relations de travail dans la Fonction publique*. Il y a, toutefois, certains cas où le plaignant n'a droit ni à l'appel ni au mécanisme de règlement des griefs.

La *Loi sur les relations de travail dans la Fonction publique* a assuré à tout employé de la fonction publique fédérale le droit d'accéder à un mécanisme de règlement des réclamations pour trancher toute plainte contre son employeur. La LRTFE est unique en ce qu'elle permet même aux personnes qui occupent des postes de direction et de nature confidentielle de présenter des griefs. En règle générale, celles-ci font partie des cadres et ne sont pas comprises dans l'unité de négociation, qu'il s'agisse du secteur public ou du secteur privé.

La *Loi sur les relations de travail dans la Fonction publique* comporte un mécanisme permanent visant au règlement des griefs par un tribunal indépendant. La législation du travail dans les autres champs d'activité exige qu'une convention collective contienne une clause relative à l'arbitrage exécutoire comme dernière étape du processus de règlement des griefs. La Loi a stipulé qu'il pourrait y avoir arbitrage des réclamations peu importe qu'une convention collective s'applique ou non au plaignant. Par le mécanisme permanent d'arbitrage, la Chambre des Communes a tenté de substituer la « Rule of Law » (règle de droit) à la discrétion administrative totale dans le domaine des relations du travail dans la fonction publique. La Chambre des Communes n'a pas voulu, cependant, que l'arbitre nommé en vertu de la Loi ait l'autorité de s'immiscer dans les prérogatives de la direction en matière de gestion et de discipline non plus que d'y passer outre. Il a voulu que l'autorité de l'arbitre de réviser la décision de la direction en ces matières se limite aux cas où la direction allait jusqu'à la sanction.

L'arbitrage ne semble pas toutefois suppléer à toutes les décisions unilatérales. Contrairement à la pratique générale, l'arbitrage, en vertu de la Loi, s'ajoute aux appels des ministères, pour ce qui est des griefs pour lesquels on ne dispose d'aucun remède satisfaisant.

Trois catégories de griefs peuvent être référés à l'arbitrage par les plaignants eux-mêmes ou leur agents de négociation (les syndicats). La première catégorie comprend tout grief d'un employé qui a trait à l'interprétation ou à l'application d'une clause de convention collective ou à une décision arbitrale. La deuxième catégorie comprend les griefs où il y a eu sanction disciplinaire contre le plaignant qu'il s'agisse de renvoi, de suspension ou d'amendes. La troisième catégorie inclut les cas où l'on recherche l'exécution d'une obligation découlant d'une convention collective ou d'une sentence arbitrale. L'agent de négociation ou l'employeur peuvent soumettre ces griefs. On appelle familièrement cette catégorie de griefs des « griefs politiques ».

La décision de l'arbitre est finale. La Commission des relations de travail dans la Fonction publique a été autorisée à réviser la décision d'un arbitre en matière de question de droit ou de compétence. Le système d'arbitrage fonctionne sous la surveillance générale de la Commission des relations de travail dans la fonction publique sous l'autorité de l'arbitre en chef. Au cours des cinq dernières années, les arbitres ont disposé d'un bon nombre de plaintes et ont ainsi donné une orientation nouvelle aux relations du travail dans la fonction publique fédérale.

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